In the Supreme Court

OF THE

United States

Supreme Court, U.S.
FILED
JUN 13 1944
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1943

323 U.S. # 12

No. 155

DEN-DOM

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a national banking association), MORTIMER FLEISHHACKER, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, JR., GEORGE I. COCHRAN, PHILIP S. BAKER, R. D. BRIGHAM, WALTER E. BUCK, WALTER A. HAAS, PAUL E. HOOVER, WILLIAM F. HUMPHREY, SAMUEL KAHN, VICTOR KLINKER, WILLIAM B. REIS, PAUL SHOUP, LEON SLOSS, JR., LOUIS SUTTER, ALFRED B. SWINERTON, T. C. TILDEN, JOSEPH O. TOBIN, WILLARD O. WAYMAN, IRENE L. BERG, Executrix of the will of William H. Berg, Deceased, R. STANLEY DOLLAR and FRANK MOSS,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT OF PETITION.

14345

AARON M. SARGENT,
Hobart Building, San Francisco 4, California,
Attorney for Petitioners.

Subject Index

Petition for Writ of Certiorari	Page
Statement of matter involved	2
Irregular signature clause on opinion	3
Court rule governing opinions filed during adjournment	5
Irregular entries in violation of rule	6
Refusal to vacate or reassign	6
Denial of rehearing	7
Questions not decided in District Court:	
Denial of hearing	7
Violation of Supreme Court decisions requiring findings	10
Standards governing proceeding under Rule 23(c) FRCP	11
Derivative status established by Supreme Court decisions	12
Local law defining shareholders' rights	17
Cross-examination of bank officers	18
Depositions of Schram and Husbands	18
Status of Reconstruction Finance Corp.	20
Infringement of right to amend and intervene	20
Suppression of record on certiorari	21
Duty to render opinion disposing of appeal	23
Jurisdiction	23
Questions presented	24
Reasons for granting the writ	26

Brief in Support of Petition	
Opinions of lower courts	32
Jurisdiction	32
Statement of the case	32
Proceedings in the District Court	34
Proceedings in Circuit Court	41
Specifications of errors	42
Right to vacate void entries in Circuit Court	44
Duty to render written opinion, supported by signatures	46

Page

Reversal for failure to make findings 53

Duty to reverse because of denial of hearing 56

Right to vacate decree on ground of mistake 57

Standards governing approval of a settlement under Rule 23(e) FRCP 58

Right to nonsuit of the petition 61

Duty to follow local law concerning derivative status 65

Denial of right to amend and intervene 68

Cross-examination of bank officers handling the negotiations 69

Right to take depositions of witnesses Schram and Husbands under Rule 26 FRCP 73

Right to take depositions of federal officials under Rule 31 FRCP 74

Privilege of witnesses 82

Question presented by refusal of bank to employ independent counsel 85

Duty to issue writ to protect right of appeal 87

Denial of due process in the Circuit Court 89

Table of Authorities Cited

Cases	Pages
Alford v. United States, 282 US 687 at 692	56
Anderson v. Akers, 7 Fed. Supp. 924 at 939	84
Arizona v. California, 283 US 423 at 452	81
Aspen Mining & Smelting Co. v. Billings, 150 US 31	24
Atherton v. Anderson, 99 Fed. 2d 883 at 889	84
Avery v. Alabama, 308 US 444	56
Brassfield v. United States, 272 US 448	56
Brewer v. Hassett, 2 FRD 222	84
Bruno v. United States, 308 US 287	56
California Water Service Co. v. City of Redding, 304 US 252	56
Case v. Los Angeles Lumber Products Co., 308 US 106 at 114	11, 12, 26, 59
Chesbrough v. Woodworth, 244 US 72	24, 34
Chicago & Great Western v. Basham, 249 US 164	24
Citizens Bank v. Opperman, 249 US 448	24
Cohen v. Young, 127 Fed. 2d 721 at 725	12, 27, 60
Cohens v. Virginia, 19 US (6 Wheat.) 264 at 403	28, 47
Consolidated Rock Products Co. v. DuBois, 312 US 510 at 525	11, 54, 60
Cox v. Montague, 78 Fed. 845	84
Delaware & Hudson Co. v. Albany & Susquehanna RR Co., 213 US 435 at 449	13, 27, 61, 68
Denicke v. Anglo Bank, 26 Fed. Supp. 240	32, 34
Denicke v. Anglo Bank, 45 Fed. Supp. 524	32
Denicke v. Anglo Bank, 141 Fed. 2d 285	32
Doctor v. Harrington, 196 US 579 at 587	13, 27, 62, 68
Eggers v. National Radio Co., 208 Cal. 308 at 313, 281 Pac. 58	17, 25, 66
Erie RR Co. v. Tompkins, 304 US 64	17, 25, 67
Federal Deposit Insurance Corp. v. Mason, 115 Fed. 2d 548	84
Federal Housing Administration v. Burr, 309 US 242	83
Federal Land Bank v. Priddy, 295 US 229	83
Fleming v. Bernardi, 1 FRD 624	84

Pages

Glasser v. United States, 315 US 60 at 69-70 57
Goess v. Ehret, 85 Fed. 2d 109 84

Hill v. Texas, 316 US 400 56

Interstate Circuit Inc. v. United States, 304 US 55 at 56 ....11, 54
In re Culhane, 269 Mich. 68, 256 NW 807 84
In re French, 315 Mo. 75, 285 SW 513, 47 ALR 688 84
In re Giannini Inc., 90 Fed. 2d 445 46
In re Millspaugh, 307 Mo. 185, 270 SW 110 84

Johnson v. Zerbst, 304 US 458 56

Keifer & Keifer v. Reconstruction Finance Corp. and Regional Agricultural Credit Corp., 306 US 381 .....20, 83
Kelley v. Everglades District, 319 US 415 at 420 ....10, 11, 54, 60
Klopstock v. Superior Court, 17 Cal. 2d 13 at 16, 108 Pac. 2d 906 .....17, 25, 65

Mahnich v. Southern Steamship Co. (Oct. Term, 1943 No. 200) 55
Mayo v. Canning Co., 309 US 310 at 316 .....11, 54
Morgan v. United States, 304 US 1 56

National Surety Co. v. Coriell, 289 US 426 at 435 .....11, 58
Norris v. Alabama, 294 US 587 56

Pepper v. Litton, 308 US 295 .....20, 28, 82
Powell v. Alabama, 287 US 45 56

Reconstruction Finance Corp. v. Menihan Corp., 312 US 81 .....20, 83
Rio Grande Irrigation Co. v. Gildersleeve, 174 US 603 at 608 46

Securities and Exchange Commission v. Chenery Corp., 318 US 80 at 94 .....10, 54
Securities and Exchange Commission v. United States Realty & Improvement Co., 310 US 434 .....11, 60
Smith v. O'Grady, 312 US 329 56
Smith v. Texas, 311 US 128 56

Texas & Pacific Ry. v. Murphy, 111 US 488 24

Pages

United States v. Burr 29, 84
United States v. General Motors Corporation, 2 FRD 528 .. 84

Voorhees v. Noye Mfg. Co., 151 US 135 24

Ward v. Texas, 316 US 547 56
Weil v. Neary, 278 US 160 at 169 46
Werner v. Crippen, 245 App. Div. 363, 282 NY Supp. 722, 270 NY 535, 200 NE 305 84
Whitten v. Dabney, 171 Cal. 621 17
Wichita Royalty Co. v. City National Bank of Wichita Falls, 306 US 103 at 110 ..... 11, 54

Codes and Statutes

Act of Mar. 3, 1891, 26 Stat. 826, Chpt. 517, Sec. 3 ..... 4, 44, 87

California Code of Civ. Proc., Sec. 2055 82

12 USCA 1 76
12 USCA 51d 14, 81, 82
12 USCA 77 ..... 76, 77
12 USCA 84 23
12 USCA 93 23
12 USCA 264i 78
12 USCA 264j 84
12 USCA 264k 78
12 USCA 282 76
12 USCA 375a 23
12 USCA 481 76
12 USCA 483 77
12 USCA 484 83
12 USCA 501a 23
12 USCA 595 23
15 USCA 604 ..... 20, 83
15 USCA 605b(b) 81
28 USCA 41 23
28 USCA 225 ..... 23, 47, 51
28 USCA 347 ..... 2, 23, 87

Rules

Supreme Court: Pages
Rule 12(1) 32
Rule 27(2c) 32
Rule 38 ..... 32, 52, 87, 89

Circuit Court:
Rule 3 ..... 5, 6, 45, 48
Rule 4 7
Rule 25 24
Rule 28 48

Federal Rules of Civil Procedure:
Rule 12a 67
Rule 23b 14, 15
Rule 23c 2, 12, 20, 25, 26, 58, 60
Rule 26 ..... 18, 36, 39, 43, 74, 82
Rule 31 ..... 18, 25, 43, 74
Rule 43b 82
Rule 52a 24, 26, 48, 52, 53
Rule 60b 25, 43, 57

Texts and Miscellaneous

American Law Institute—Address of Hon. Robert H. Jackson 56

Canons of Professional Ethics of American Bar Assn. (No. 6) 71

Democracy and Finance—William O. Douglas, pp. 56, 234, 235, 239 ..... 64, 72

Discovery—Against Federal Administrative Agencies—Pike & Fischer (56 Harvard Law Rev. 1125) 84

Federal Administrative Procedure Act—proposed by Am. Bar Assn. (Journal issue of Apr. 1944, p. 228) 51

Jurisdiction of the Supreme Court of the United States—Robertson & Kirkham, p. 542 88

Law and Its Administration—Harlan F. Stone (Columbia University Press 1924), p. 213 49

Page

Methods of Reaching and Preparing Appellate Court Decisions—published by Judicial Section of Am. Bar Assn. —1942, p. 22 50

Report of Will Shafroth, Chief of Division of Procedural Studies and Statistics 52

Statement of Hon. Louis D. Brandeis before Commission on Industrial Relations of 64th Congress, 1st Session—Senate Document Vol. XXVI, p. 7661 (1915)..... 64

Supreme Court of the United States—Charles Evans Hughes (Columbia University Press), pp. 64-65..... 49

Testimony of Justice Van Devanter on Senate Bill 2176, 74th Congress, 1st Session in 1935..... 88

The Business of the Supreme Court—Frankfurter & Landis, p. 276 89

The Modern Corporation and Private Property—Berle & Means, pp. 277, 278..... 63

The Struggle for Judicial Supremacy—Robert H. Jackson (Alfred A. Knopf, 1941), pp. 293-294..... 63

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1943

No.

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a national banking association), MORTIMER FLEISHHACKER, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, JR., GEORGE I. COCHRAN, PHILIP S. BAKER, R. D. BRIGHAM, WALTER E. BUCK, WALTER A. HAAS, PAUL E. HOOVER, WILLIAM F. HUMPHREY, SAMUEL KAHN, VICTOR KLINKER, WILLIAM B. REIS, PAUL SHOUP, LEON SLOSS, JR., LOUIS SUTTER, ALFRED B. SWINERTON, T. C. TILDEN, JOSEPH O. TOBIN, WILLARD O. WAYMAN, IRENE L. BERG, Executrix of the will of William H. Berg, Deceased, R. STANLEY DOLLAR and FRANK MOSS,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Owen J. Roberts, Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson, and Wiley Rutledge, Associate Justices of the Supreme Court of the United States:

This is an application under Section 240 of the Judicial Code (28 USCA 347) for a review, on certiorari, of the following matter, viz:

Case No. 10,329 (CCA 9th Cir.) entitled "Ernest H. Denicke and Mary E. Doble, Appellants v. The Anglo California National Bank of San Francisco, et al., Appellees."

SUMMARY STATEMENT OF THE MATTER INVOLVED.

We come to this Court with a record disclosing serious misconduct in the Circuit Court of Appeals for the Ninth Circuit. There has been a miscarriage of justice. Certiorari is necessary to correct that condition.

Nature of the Litigation.

Petitioners are prosecuting a derivative suit on behalf of The Anglo California National Bank of San Francisco. Respondents are present and former directors charged with violations of Federal Banking Laws. The damages arise from breach of trust. The loss exceeds four million dollars.

The District Court approved a settlement without making the inquiry required by Rule 23(c) FRCP. The bank engineered this proposal. It accepted five percent of the liability, thus obtaining a release for twenty-two of its directors.

Petitioners objected. They were denied a hearing. There were no findings. Judgment was entered without a trial. A motion to vacate was denied.

Gross Irregularities in the Circuit Court.

The Circuit Court refused to decide the questions presented. An irregular opinion was filed during adjournment. *This document was void, and in violation of Court rules because of the lack of a concurring signature.* We present same as,—

Petitioners' Exhibit No. 1.
Signature Clause Attached to "Opinion".

"*We* need not stop to inquire whether the order denying appellants' motion to vacate the judgment was appealable, for the opinion already sufficiently indicates *our view* that appellants had ample time and a reasonable opportunity to present a full showing in opposition to the compromise. *We* find no merit in other points argued.

"Affirmed.

_____

_____

William Healy,

United States Circuit *Judges.*"

This document was prepared for the signatures of *three* "United States Circuit Judges". It was signed by *one Circuit Judge.*[1]

It was the act of Circuit Judge Healy. It was not the act of the Circuit Court of Appeals for the Ninth Circuit.

In that Circuit, the power of an individual judge is strictly limited during adjournment. He has no authority to *announce* a decision. He may join with one or more of his associates and *render* a decision by filing *signed opinions* or other *documents of decision* with the clerk. There is no other procedure.[2] Litigants are entitled to *documentary evidence,* supported by the *signatures* of at least *two Circuit Judges.*

This practice was established by an amendment of the rules effective November 30, 1936. That amendment was evidenced by a document signed by every member of the Court. We present same as our next exhibit.

---

[1]Clerk of CCA refused to print a true copy of the opinion. In spite of our designation (R. 2070, item 8) the irregular signature clause was left out. (R. 1996 at 2004.) The transcript is false in not showing the matter quoted on preceding page. We file, herewith, motion to correct diminution of record.

[2]Authority to adopt such rule granted by the Act providing for organization of the Circuit Courts of Appeal. See:

> Act of Mar. 3, 1891, 26 Stat. 826, Chap. 517, Sec. 2. "The court shall have power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law."

Petitioners' Exhibit No. 2.

"UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN THE MATTER OF THE AMENDMENT
OF RULE III OF THE RULES OF
PRACTICE OF THIS COURT.

IT IS HEREBY ORDERED that Rule III of the Rules of Practice of this Court be amended by the addition of a paragraph number (4) to said rule, as follows:

(4) No adjournment in any of the terms of the Court shall be made to the succeeding term save when made on the last day prior to the beginning of such succeeding term. *Appeals shall be deemed decided when announced from the bench in a session of the court at the place of the term in which they are submitted, or when the signed opinions or other documents evidencing their decision are filed with the Clerk.*

Dated: Nov. 30, 1936.

(Signed) Curtis D. Wilbur

Francis A. Garrecht

(Endorsed) William Denman

Filed Nov. 30, 1936 Clifton Mathews

Paul P. O'Brien, Clerk Bert Emory Haney

United States Circuit Judges."[3]

[3]Clerk of CCA disregarded our designation of this document (R. 2074, Item 8a.) We include it in our motion filed herewith to correct the record.

The Court had a membership of five when this document was filed.

Clerk's Entries During Adjournment.

The "opinion" was filed March 1, 1944. On the same day, the Clerk made an "Order" and entered a "Decree". *Both were unsigned.* The Court was not in session. *It did not make any order. It did not direct the entry of any decree.*[4]

Refusal to Vacate the "Decree".

We moved to set aside these proceedings. (R. 2005.) Circuit Judge Mathews presided. He was accompanied by Judge Healy—author of the opinion. The third member was absent.[4a] *These two sat to pass upon their conduct in our case.* Argument on the motion was cut short. Judge Mathews made the following statement from the Bench:

> "Rule 3, paragraph 5, is a rule made by this court for the guidance and protection of its clerk. Neither you nor your clients have any interest in enforcing that rule. *It isn't any of your business whether that is complied with, or not.*" (R. 2058.)

Application for Reassignment in Bank.

We sought an immediate reassignment to the Court in bank. By praecipe, the clerk was requested to present such

---

[4]The clerk was involved in four distinct violations of duty on this date.

1. Entry of "Order Directing Filing of Opinion and Filing and Recording of Decree". (R. 1995.) Court held no session—no signed document was furnished to sustain such entry. There was no transaction to enter.
2. The Healy Opinion was not in due form. The clerk violated his duty to appellants in filing it.
3. Filing of "Decree". Clerk took a printed form, filled in the blanks with typewriter, and filed it without signature.
4. Entry of "Decree" in Minute Book. (R. 2004.) The same document was then recopied after filing.

[4a]Appeal was argued and submitted to Circuit Judges Mathews, Stephens and Healy February 15, 1944. (R. 1994.)

application to the senior judge for action under Rule 4 of the Circuit Court. (R. 2014, 2015.) It was ignored. *The docket fails to show whether it was presented, or withheld, or considered, or denied.*[4b]

Denial of Petition for Rehearing.

We petitioned for a rehearing *in bank*. We asked for consideration of that petition *in bank*. It does not appear to have been examined by any judge not originally assigned to our case. Circuit Judges Mathews, Stephens and Healy sat to deny rehearing.[5]

We now present the questions which the Circuit Court refused to decide.

Point No. 1.

Denial of a Hearing in the District Court.

We start with a flagrant violation of the Bill of Rights—the entry of a judgment without trial. The facts do not admit of dispute:

[4b]CCA Rule 4 reads,—

"Assigning of Causes for Hearing.

(1) The calendars of the court shall be made up by the clerk *under the direction of the senior circuit judge subject to the approval of the majority of the judges.*

(2) The senior circuit judge *after conference* with the circuit judges shall designate and assign the judges who are to hear the causes placed upon the calendars of the court; *such designation or assignment may be modified or set aside by a majority of the judges.*"

[5]We request this Court to read the Petition for Rehearing at R. 2017. This document discloses deliberate failure to decide the questions presented on appeal. In spite of the miscarriage of justice disclosed therein, it was impossible to obtain action from any judge who did not sit in the first instance. Order denying rehearing is at R. 2061.

On March 19, 1942 the bank petitioned for approval of a settlement. (R. 314.) An order to show cause issued. (R. 329.) Petitioners objected. (R. 333, 340.) These pleadings raised factual issues requiring a hearing.

On March 31, 1942 the bank presented its case on the petition. (R. 1845.) We moved for a nonsuit. (R. 1883.) The Court suggested that counsel submit the entire matter. A discussion followed. Then the Court acted *on its own initiative. It continued the petition until April 21, 1942, for a "further hearing".*[6]

By this order, the petition was *put on the calendar.* Thereafter it was *kept on the calendar.* The Court made five subsequent orders. Each postponed the date set for *further hearing.*[7] The last one provided for a trial on August 18, 1942.

Discovery was conducted to prepare for that hearing. The bank was required to photostat ledger cards. (R. 393.) Petitioners employed an auditor. His report showed a loss

---

[6]March 31, 1942 Minute Order at R. 392; same facts are shown by clerk's worksheet (R. 1937), and by closing entry in reporter's transcript. (R. 1890.)

[7]April 13, 1942. "Ordered . . . further hearing on the motion to terminate proceedings, be continued from April 21, 1942, to May 5, 1942." (R. 398-399.)

May 1, 1942. "Ordered . . . further hearing on the motion to terminate proceedings, be continued from May 5, 1942 to May 19, 1942." (R. 399.)

May 13, 1942. "Ordered . . . further hearing on the petition to terminate . . . continued from May 19, 1942, to June 19, 1942." (R. 402.)

June 13, 1942. "Ordered that all matters now on the calendar . . . are continued to July 1, 1942." (R. 429.)

June 22, 1942. "Ordered that all matters in this case now on the Calendar of this Court for July 1, 1942, be continued to August 18, 1942." (R. 438.)

of $4,029,449.52. (R. 404, 406.) This data was assembled in April and May, 1942.

Depositions were taken at Portland, Los Angeles and San Francisco. These resulted in the discovery of material documents, and the development of proof to establish primary liability.[8] Counsel traveled 2500 miles to attend these hearings.

Amended objections were filed May 20, 1942. (R. 403.) In serving the bank, petitioners included a letter of transmittal to confirm the state of the record. We quote therefrom:

> ". . . according to the minute order entered Mar. 31, 1942, there is now pending a motion by plaintiff for a nonsuit with respect to petition of the bank for termination of the litigation. *In case there should be an order denying this motion for nonsuit, plaintiff is entitled to introduce evidence in support of his objections.*" (R. 1941.)

By the end of June, 1942, depositions were ready. The audit was complete. Petitioners were prepared for trial. *Their objections had been carried on the calendar for three months.*

The District Court then reversed itself without notice. It had acted *on its own motion* in continuing objections for a hearing. *It now acted ex parte and overruled them without trial.* (R. 438.) Judgment was entered in petitioners' absence. (R. 458.)

The bank took this opportunity to suppress the suit. Although joined as a defendant, it sought to act as plaintiff

[8] R. 797, 845, 866, 871, 879.

for the purpose of filing a "Dismissal". (R. 461.) The Court made an ex parte order to ratify such action.

Immediate steps were taken to vacate these proceedings. Petitioners filed Demand for Trial (R. 464), Motion to Vacate (R. 468), Supporting Affidavit (R. 471) and Offers of Proof (R. 481). These applications were denied from the bench. (R. 736.) Petitioners were told to take their case to the Circuit Court of Appeals.

Questions presented.

There were two distinct infringements of fundamental rights, viz.:

1. Refusal to grant the trial secured to petitioners by minute entries made in the District Court.

2. Right to vacate the decree under Rule 60(b) FRCP on the ground of mistake.

Neither question was decided in the Circuit Court.

Point No. 2.

Violation of Supreme Court Decisions Requiring Findings.

We have a judgment unsupported by findings. There is nothing except a general recital in the decree. *The issues raised by objections are not even covered by a recital.* There has been a total failure to comply with Rule 52(a) FRCP.

The Circuit and District Courts have each violated the following decisions of this Court, viz.:

Kelley v. Everglades District, 319 US 415 at 420;

Securities and Exchange Commission v. Chenery Corp., 318 US 80 at 94;

Consolidated Rock Products Co. v. DuBois, 312 US 510 at 525;

Mayo v. Canning Co., 309 US 310 at 316;

Wichita Royalty Co. v. City National Bank of Wichita Falls, 306 US 103 at 110;

Interstate Circuit Inc. v. United States, 304 US 55 at 56.

Questions presented.

1. Duty of inferior Federal Courts to follow and apply the law as laid down by decisions of the Supreme Court of the United States.

2. Right of a litigant affected by a violation of that duty to obtain relief and compliance on certiorari.

Point No. 3.

Standards Governing a Proceeding Under Rule 23(c) FRCP.

In receivership and Chandler Act cases, this Court has held that settlements with creditors and security holders must be based upon "an informed and independent judgment"; that objections must receive "orderly consideration"; and that a District Court must act in such matters on the basis of "detailed and authentic information". We cite:

National Surety Co. v. Coriell, 289 US 426;

Case v. Los Angeles Lumber Products Co., 308 US 106;

Securities and Exchange Commission v. United States Realty & Improvement Co., 310 US 434;

Consolidated Rock Products Co. v. DuBois, 312 US 510;

Kelley v. Everglades District, 319 US 415.

In the Sixth Circuit, a similar rule has been applied to proceedings under Rule 23(c) FRCP, for compromise of shareholders' suits. See *Cohen v. Young*, 127 Fed. (2d) 721.

In the Ninth Circuit, the Court has arrived at a result which is diametrically opposed. It has refused to apply any proper standard of conduct, leaving the dismissal of such suits to the *uncontrolled discretion of a district judge.*

In our case, the Court rejected proof of the damage. An auditor's report showing $4,029,449.52 loss was excluded. (R. 404.) It refused to consider the financial responsibility of parties released. (R. 421, 521.) It ignored documentary proof sustaining the liability. *It even denied petitioners an opportunity to read depositions into the record.* (R. 573.)

The Circuit Court refused to consider what standards should have been applied. We cited *Cohen v. Young* (R. 2032) and *Case v. Los Angeles Lumber Products Co.* (R. 2043.) These decisions were ignored. It has been impossible to obtain a ruling.

Point No. 4.

Refusal of Right to Recognize Derivative Status.

The bank had no right to dismiss. It should not have been allowed to petition. The Court had no power to make an ex parte order ratifying a dismissal. These questions all depend on the same essential fact, viz.: *derivative right of stockholders to maintain suit.*

A stockholder with status to sue has, as a corollary, the right to manage and control the litigation. He has the right to prevent a dismissal.

The corporation, *as a defendant*, has rights similar to any other party so joined. It has the right to obtain a dismissal on payment or satisfaction of the claim. It may, therefore, submit an offer on terms "fair and equitable" to stockholders. Such a settlement is equivalent to a satisfaction. It has no right to dismiss on any other basis.

The District Court committed palpable error in treating petitioners as "guardians ad litem". It should not have allowed the bank to supplant them by filing a petition. Derivative status was controlled by the decisions of this Court in:

Delaware & Hudson Co. v. Albany & Susquehanna RR Co., 213 US 435;[8a]

Doctor v. Harrington, 196 US 579.[8b]

Hostile conduct of the management is there held to create a derivative right. It is also held that a corporation joined in a stockholders' suit must be aligned in accordance with the facts—where shown to be opposed to the interests of its stockholders—it must be treated as a defendant.

[8a]In *Delaware & Hudson* case, Justice McKenna held that an adverse interest within the corporation, resulting in a denial of liability, would create status. "... it was natural enough that a stockholder should seek more earnest representatives . . . Emergencies may arise in which the antagonism between the directory and the corporate interest may be unmistakable, and the requirements of the rule may be dispensed with, or, it is more accurate to say, do not apply." (213 US 447, 451.)

[8b]In *Harrington* case, Justice McKenna held that "The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic to him, and made to act in a way detrimental to his rights. . . . If a controversy hence arise . . . it can be litigated in a federal court". (196 US 587.) Here, the corporation was aligned as defendant and diversity of citizenship was thus established to support the jurisdiction.

Derivative Facts Shown by the Record.

Rule 23(b) FRCP was satisfied by a demand before suit, followed by an unsuccessful application at a stockholders' meeting. (R. 47, 1494.)

The Reconstruction Finance Corporation acquired the majority stock about two months later.[9] We applied to that agency. Its Chairman, Emil Schram, refused to interfere.[10]

The bank was caught in a conspiracy with its directors. *It was found prosecuting appeal from a judgment in its own favor.* That judgment was entered in another stockholders' suit—being for recovery of secret profits obtained by former president Herbert Fleishhacker.[10a]

These facts were communicated to Chairman Schram. Petitioners were again unable to secure relief. They were not even successful in obtaining an explanation.[11]

---

[9]Purchased $20,000,000 of preferred stock under 12 USCA 51(d), for a recapitalization completed Dec. 27, 1938. (R. 1000.) These funds were used to retire a prior issue of preferred stock ($5,000,000 par value sold June 1933), to absorb writeoffs aggregating $12,943,744.71 (R. 1280) and provide working capital. Substandard assets (including such writeoffs) amounted to $23,353,610.79 at date of the Dec. 1938 recapitalization. (R. 1283.)

[10]Counsel for petitioner Denicke received letter from Schram, Chairman of RFC, Oct. 19, 1939, stating that it was RFC policy to "refrain from interfering with the detail operation of a bank whose preferred stock it owns". (R. 582.)

[10a]This violation of duty was exposed in the Circuit Court. Herbert Fleishhacker went on with his appeal seeking certiorari. Transcript in that matter is of record as No. 181 Oct. Term, 1940. This record shows that the bank took a positive stand in lower Court as appellant, assigning errors in its own behalf to obtain reversal. (Blum, R. 775.) Case docketed in this Court as *Fleishhacker v. Blum.*

[11]Letter Sargent to Schram, Mar. 8/40, shows misuse of bank name to reverse decree against Herbert Fleishhacker, former president—activities of management in that behalf—use of corporate power to protect directors—impossibility of obtaining appointment of independent committee to inquire into facts. (R.

Rule 23(b) FRCP allows a plaintiff to show "reasons for not making (an) effort" to obtain relief within the corporation. We complied with this part of the rule.

Facts Taking Case Out of Rule.

The bank moved to dismiss, alleging want of jurisdiction. (R. 926, item 5.) It stood by while executive committee members (represented by its present counsel) sought dismissal on the merits.[12] It suppressed documents proving directors' liability. It pretended that shareholders were not entitled to that information. (R. 1558.) It filed false answers to interrogatories. It concealed $3,900,000 in loans involving directors.[13] It refused to employ independent

1588.) See also letter Sargent to Schram, Mar. 20/40, showing refusal of bank counsel to explain conduct on this appeal (R. 1613); also letter Doble to Thomson, Mar. 13/40 (Pres. of bank elected by RFC), requesting disclosure of expense incurred to overthrow such decree (R. 1205), and Thomson's denial of receipt of such letter. (R. 1199.)

[12]Chickering & Gregory (now counsel for bank) filed motions in March 1939, seeking dismissal on behalf of executive committee members Wayman, Kahn and Reis. (R. 51, 60.)

[13]See interrogatories to bank (R. 84) and answers. (R. 191.) Analysis thereof shows concealment of the following accounts involving directors:

Robert Dollar Co. (R.S. Dollar) R. 1364	$1,659,900.00
Sitka Spruce Co. (H. Fleishhacker, R.S. Dollar) R. 1364	356,695.95
Western Publishing Co. (H. Fleishhacker, Shoup, Humphrey) R. 1364	125,000.00
Wilmac Inc. (Humphrey, H. Fleishhacker) R. 628	601,271.54
T. S. Cattle Co. (Humphrey) R. 628	185,890.08
Planatol Co. (H. Fleishhacker, Humphrey, Tyson) R. 628	132,000.00
Kingsbury R. 1307	263,000.00
Shoup R. 1310	26,000.00
Pahrump Valley Co. (H. Fleishhacker, Shoup) R. 1367	76,654.68
Spring Canyon Coal Co. (H. Fleishhacker, Shoup) R. 1367	284,654.93
Lindgren & Swinerton Co. R. 1369	190,000.00
Total amount concealed	$3,901,067.18

counsel. In May, 1941, petitioners offered to cooperate with any group able to furnish independent representation for the common stock. (R. 1651.)

The body of the corporation has been used as a Trojan Horse to shield directors. It has acted as plaintiff to seek dismissal, as a defendant to oppose discovery, and as a "neutral" when petitioners sought to investigate its conduct. It has never been represented by counsel not identified with the defense of its directorate.

For five years, funds which should be held in trust for stockholders, have been squandered to support collusive efforts to suppress suit. The corporation has been spending money to prevent its shareholders from collecting damages which belong to them. A so-called "new management" installed after suit, has been party to this course of action.

Questions presented.

1. Nature and extent of petitioners' right to manage and control the litigation.

2. Limitation on the right of the bank to petition for dismissal.

3. Petitioners' right to nonsuit the petition.

The Circuit Court failed to decide these questions. It refused to cite the *Delaware & Hudson* and *Harrington* cases. The issue was avoided by a reference to *Hawes v. Oakland,* 104 US 450, involving a set of facts not remotely in point.

Point No. 5.

Disregard of Local Law Defining Stockholders' Rights in Corporate Property.

The District Court treated petitioners as having no greater standing than guardians ad litem. It relied on dictum from an early California case.[14] On appeal, we cited:

Klopstock v. Superior Court, 17 Cal. (2d) 13, 108 Pac. (2d) 906 (decided Jan. 10, 1941);

Eggers v. National Radio Co., 208 Cal. 308, 281 Pac. 58 (decided Sept. 30, 1929).

In the *Klopstock* case. it was held that the ultimate interest of a shareholder was sufficient to sustain suit—that his derivative right passed to his executor in case of death, with an ultimate right in favor of his heirs.

The *Eggers* case recognizes the status of minority stock whenever a corporate management fails to press claims in good faith. California decisions accord with the overwhelming weight of authority.

The Circuit Court ignored these decisions. It erroneously applied the rule in *Erie RR Co. v. Tompkins,* 304 US 64, assuming that the bank's right to obtain realignment would be governed by local law. Procedure and not substance was involved in this latter question. It was clear

[14] *Whitten v. Dabney,* 171 Cal. 621, suggesting that a stockholder suing for a corporation is a guardian ad litem who invokes legal process for the purpose of starting a suit. The California Court used that analogy, solely as dictum, to demonstrate that the liability in a derivative suit would be barred when the corporation had lost its right to sue—also to show that an individual shareholder had no power to discharge a corporate claim without Court approval.

under local law that petitioners had property rights sufficient to support relief in equity.

Point No. 6.

Cross-Examination of Bank Officers.

Petitioners sought to cross-examine the President, William H. Thomson; First Vice-President Calkins, and Vice-President Hoover. These parties handled the settlement negotiations. Their testimony would have disclosed concealment of the loss,—suppression of documents,—and conspiracy to enable directors to avoid liability.

Point No. 7.

Depositions of Schram and Husbands.

Cross-examination of the witness Emil Schram (former Chairman of RFC) involved a letter sent to petitioners in October 1939, disclosing refusal to interfere with management policy.

The testimony of Sam H. Husbands (director of RFC and of Anglo Bank) concerned his participation in the settlement negotiations.

Process was sought against both witnesses under Rule 26 FRCP. (R. 580.)

Point No. 8.

Depositions Under Rule 31 FRCP.

Interrogatories were propounded to officers connected with various federal agencies:

1. To establish the flagrant character of the liability.

2. To show that the bank's representatives had knowledge of the guilt of the parties to be released.

3. To compare failure in law enforcement before suit —with a failure to enforce liability after suit.

The following persons were named:

J. F. T. O'Connor (former Comptroller of the Currency) concerning law enforcement before suit.

Marriner S. Eccles (Chairman of Federal Reserve) concerning failure of that agency to prevent mismanagement (R. 680);

Leo T. Crowley (Chairman of Federal Deposit Insurance Corporation)—to obtain the same facts regarding action of FDIC as insurer of deposits of respondent bank (R. 684);

William F. Folger (Chief National Bank Examiner) to locate documents to complete case of directors' liability, and to explain relation of other agencies to mismanagement existing between 1933 and 1938. (R. 693.)

Jesse Jones (Chairman of RFC) concerning failure to exercise power of control over Anglo Bank management acquired in 1933.

Bank officers and RFC officials were unquestionably subject to process—the former on the ground that the corporation was joined as defendant—the latter, because RFC is an agency created with power to sue and be sued. No statutory privilege existed in favor of the other witnesses.

Refusal to allow this testimony affected the validity of the judgment. The Circuit Court refused to pass on that question.

Important Question—Status of Reconstruction Finance Corporation.

This appeal raises questions of special importance. RFC is majority stockholder. It is a fiduciary under the decision of this Court in *Pepper v. Litton*, 308 US 295 at 306.

It was chartered with the power to sue and be sued. (15 USCA 604.) Its officers and directors—in fact all of its operations, are necessarily subject to legal process. (*RFC v. Menihan Corp.*, 312 US 81; *Keifer & Keifer v. RFC and Regional Agricultural Credit Corp.*, 306 US 381.)

On certiorari it will be the duty of this Court to determine the standards which apply to that set of facts.

There is presently a conflict between the Sixth and Ninth Circuits which should be settled by the granting of a writ. This Court should define the scope of hearing required by Rule 23(c) FRCP.

Point No. 9.

Infringement of Right to Amend and Intervene.

Petitioners lodged a Third Amended Complaint containing the proof developed by discovery between April and June 1942. (R. 537.) Mrs. Doble applied for intervention and leave to appear as co-plaintiff. (R. 466, 532.) She had previously acted as an objecting stockholder, Mr. Denicke being the original plaintiff.

Both motions were denied. The constitutional right to a trial includes the right to plead a case on the merits.

Duty to Render Adequate Opinion.

This appeal involved nine substantial questions. None of them have been decided. The Circuit Court refused to cite or distinguish cases in point. It declined to follow opinions rendered by this Court. It infringed petitioners' right to a decision, *in writing*, covering the issues involved. It violated their right to have a document evidencing such decision, authenticated by the signatures of at least two circuit judges.

SUPPRESSION OF RECORD ON CERTIORARI.

We designated the documents required to show irregularity in the Circuit Court.[15] The judges responded by filing an *ex parte* order to keep such matter out of the transcript. We present that order as:

Petitioners' Exhibit No. 3.

"ORDER RE PREPARATION OF RECORD FOR CERTIORARI PURPOSES

Mr. Aaron M. Sargent, counsel for appellants, having requested the clerk to prepare a record for use upon petition for writ of certiorari, in the above-entitled case, and to issue as a part of the certified record a photostatic copy of the opinion of this court, *it is Ordered that the clerk prepare the record in the usual and customary manner.*

---

[15]Photostat of entire Opinion, including irregular signature clause (R. 2070, item 8); also photostat of document evidencing amendment of rules signed by entire Court. (R. 2074, item 8a.)

Dated: San Francisco, California, April 14, 1944.

CLIFTON MATHEWS,
United States Circuit Judge.

FILED
Apr. 14, 1944
Paul P. O'Brien,
Clerk.

ALBERT LEE STEPHENS,
United States Circuit Judge.

WILLIAM HEALY,
United States Circuit Judge."

(R. 2066.)

The Clerk was requested to photostat and certify these records as separate documents. He refused.[16] An incomplete record has been transmitted to this Court. The body of the Opinion was printed. The signature clause was left out.[17] The clerk certified that the documents furnished were true copies of the originals.[18]

We then tested our right by motion. Circuit Judges Mathews, Stephens and Healy sat to deny that motion. No argument was permitted. Judge Mathews made the following statement from the bench:

> "We have here a so-called motion to obtain certified photostatic copies of designated records, in the case of Denicke and Doble against The Anglo California National Bank, No. 10329. We have examined this so-called motion. We find that it is simply a request to the Court that the Court require the clerk to do that

---

[16]Praecipe requesting such copies filed with clerk May 10, 1944—copy thereof included in motion to correct transcript.

[17]See R. 2004 showing omission of signature clause in printing of Opinion.

[18]Clerk's certificate to this Court (R. 2078) is obviously false. It states that the documents included are "full, true and correct (copies) . . . as the originals thereof remain on file".

which we have told him not to do. We wont entertain this motion. The motion is denied."

We demanded a hearing.

"Mr. Sargent. I ask for my constitutional right to argue the motion.

Judge Mathews. Motion denied. Court will be adjourned.

Mr. Sargent. *I renew my request for my constitutional right to argue the motion.*

Judge Mathews. *You have no such right as that. The Court will be adjourned.*"[19]

JURISDICTION.

This Court has jurisdiction under Section 240 of the Judicial Code as amended by the Act of February 13, 1925. (28 USCA 347.)

The Circuit Court had jurisdiction under Section 128 of said code (28 USCA 225); the District Court had original jurisdiction under Section 24 thereof. (28 USCA 41.)

Suit arose under the laws of the United States. It was an action to enforce directors' liability created by the National Bank Act and Federal Reserve Act.[21] Original

---

[19]Statement appears in Reporter's Transcript filed in Circuit Court—included in Motion for Enlargement.

[21]Defendant directors were charged with permitting violation of loan limit (12 USCA 84), with assenting to illegal loans to executive officers (12 USCA 375a), and with receipt of bonuses and other considerations in connection with the granting of loans (12 USCA 595). Directors were liable for such violations under 12 USCA, Secs. 93 and 501a, which are respectively part of the National Bank Act and Federal Reserve Act.

jurisdiction is sustained by *Chesbrough v. Woodworth*, 244 US 72.

The Circuit Court entered a "judgment" on March 1, 1944. (R. 2004.) Petition for rehearing was filed within the time required by rule (R. 2017)[22] and was denied April 7, 1944. (R. 2061.)

The time for certiorari did not run until denial of such petition.[23]

Petition for a writ is filed within three months of order denying rehearing.

QUESTIONS PRESENTED.

1. Duty to issue a writ in order to cancel void entries made by the Circuit Court.

2. Duty to grant the writ in order to protect petitioners' right to an appellate review of their case.

3. Right to an adequate opinion or other decision in writing, signed by two or more Circuit Judges, and disclosing the action taken by the Circuit Court with respect to all substantial questions raised on appeal.

4. Right to a writ to obtain reversal and compliance with decisions of this Court requiring findings under Rule 52(a) FRCP.

---

[22]CCA Rule 25 allowing filing within 30 days after judgment. Decree was dated March 1, 1944. We filed March 29, 1944. Order denying rehearing showing filing within time permitted. (R. 2061.)

[23]*Citizens Bank v. Opperman*, 249 U.S. 448; *Texas & Pacific Ry. v. Murphy*, 111 U.S. 488; *Chicago & Great Western v. Basham*, 249 U.S. 164; *Aspen Mining & Smelting Co. v. Billings*, 150 U.S. 31; *Voorhees v. Noye Mfg. Co.*, 151 U.S. 135.

5. Duty to issue writ and direct reversal because of judgment entered without trial of objections in the District Court.

6. Duty to issue such writ to direct reversal of judgment under Rule 60(b) FRCP on the ground of mistake.

7. Duty to order reversal because of refusal of District Court to admit evidence under Rule 23(c) FRCP.

8. Duty to direct District Court to grant nonsuit because of derivative status established by petitioners, and lack of capacity in bank to maintain a petition.

9. Duty to recognize local law as declared in *Klopstock v. Superior Court,* 17 Cal. (2d) 13, 108 Pac. (2d) 906; and in *Eggers v. National Radio Co.,* 208 Cal. 308, 281 Pac. 58, confirming property right of petitioners sufficient to support stockholders' suit.

10. Erroneous application of *Erie RR Co. v. Tompkins,* 304 US 64, in holding that procedure for realignment of bank as party plaintiff would depend on state law rather than upon federal rules.

11. Right to cross-examine bank officers handling settlement negotiations.

12. Right to take depositions of officers of RFC who were parties to settlement discussions.

13. Right to propound interrogatories under Rule 31 FRCP to officers of RFC, Federal Reserve and FDIC, regarding transactions before suit.

14. Right to propound such interrogatories to Chief National Bank Examiner to locate documents within the scope of a *subpoena duces tecum.*

15. Right to file amended pleading setting up facts developed by discovery—and right to intervene and appear as co-plaintiff in such pleading.

REASONS FOR GRANTING THE WRIT.

1. To vacate the judgment and set aside the arbitrary and irregular entries made by the Circuit Court herein.

2. To protect petitioners' right to an appellate review.

3. To enforce compliance with decisions of this Court requiring findings under Rule 52(a) FRCP.

4. To secure petitioners' constitutional right to a trial of their objections and to correct the miscarriage of justice which has resulted from a refusal to recognize that right.

5. To lay down adequate standards governing opinion writing and the entry of judgments by Circuit Courts, to the end that the irregularities disclosed in this case may not be repeated.

6. To define adequate procedure governing the right of a litigant to obtain rehearing in bank in a Circuit Court, where necessary to correct palpable error.

7. To lay down proper standards governing approval of settlements under Rule 23(c) RFCP—and to define the meaning of the term "fair and equitable", as applied to such a proceeding.

8. To consider the application of the decision of this Court in *Case v. Los Angeles Lumber Products Co.*, 308 US 106, and other Chandler Act cases—in respect to proceedings for compromise of a shareholder's suit.

9. Conflict between Sixth and Ninth Circuits. In the former, standards similar to those in Chandler Act cases are enforced. See *Cohen v. Young*, 127 Fed. (2d) 721. In the Ninth Circuit, dismissal of a stockholders' suit has been held to rest in the *uncontrolled discretion of a District Judge.*

10. Departure from proper course of judicial proceedings in the Circuit Court—as shown by entry of a void decree, the filing of an Opinion in violation of Rule, refusal to vacate decree, failure to entertain proper motion for that purpose, refusal to consider application for reassignment, refusal to grant rehearing in bank, suppression of material facts from transcript, refusal to separately certify material records, and denial of motion for copies of papers within the scope of records required by law to be kept public in said Court.

11. Complete disregard of duty in sanctioning arbitrary conduct of District Court in entering judgment without trial or findings.

Special Questions of Public Importance.

12. *Derivative status.* This case involves a modern application of the principles announced in *Delaware & Hudson Co. v. Albany & Susquehanna RR. Co.*, 213 US 435, and in *Doctor v. Harrington*, 196 US 579. The widespread use of proxy voting, the dispersion of shareholders, and the shifting of power in favor of corporate managements has made this problem of unusual importance. This Court should analyze and restate the law applicable to that set of facts.

13. *RFC Status.* The Reconstruction Finance Corporation is majority stockholder. Its rights and obligations

should be defined. This Court should apply the rule in *Pepper v. Litton*, 308 US 295, 306 to that situation.

14. *Failure of jurisdiction on appeal.* The Circuit Court has arbitrarily declined to exercise the powers granted to it by Congress. The result has been a miscarriage of justice. This condition establishes a right of review on certiorari. Petitioners rely on the Opinion of Chief Justice Marshall in *Cohens v. Virginia*, 19 US (6 Wheat.), 264 at 403.

> "The judiciary cannot, as the legislature may, avoid a measure. . . . We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it is brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."

15. *Right of subpoena.* In refusing to permit cross-examination of the persons involved in settlement negotiations, the District Court raised questions of tremendous importance. Petitioners sought the testimony of bank officers and federal officials.

This process was claimed to rebut adverse presumptions indulged without a trial. The Constitutional right to a subpoena was invaded.

The remedy of a Congressional subpoena has recently been the subject of public interest. That process furnishes the method for discovering truth in legislative matters.

Individual rights are secured by a similar process—the judicial subpoena. This includes the *subpoena duces tecum*. That right is basic. Without it, impartial administration of justice is impossible.

We have created Courts where all men can be heard. Due process of law has been guaranteed. We have provided for equal justice under law. The humblest man in our nation is guaranteed these rights as against the most powerful interest.

For one hundred and thirty-seven years this process has been kept inviolate. It was recognized by Chief Justice Marshall in June, 1807, on the trial of Aaron Burr,

> "It is a principle of the English Constitution that the King can do no wrong; that no blame can be imputed to him, that he cannot be named in debate.
>
> By the Constitution of the United States, the President as well as every other officer of the government may be impeached and may be removed from office on high crimes and misdemeanors.
>
> * * * the President is elected from the mass of the people, and, on the expiration of the time for which he is elected, returns to the mass of the people again.
>
> Whether essentially this difference of circumstances must vary the policy of the laws of the two countries, in reference to the personal dignity of the chief executive, will be perceived by every person * * *
>
> If, then, as is admitted by the counsel for the United States, a subpoena may issue to the President, the accused is entitled to it, of course; and, whatever difference may exist with respect to the power to compel the same obedience to the process, as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it * * *
>
> *The court can perceive no legal objection to issuing a subpoena duces tecum to any person whatever, provided the case be such as to justify the process* * * *

It is not for the court to anticipate the event of the present prosecution. Should it terminate as is expected on the part of the United States, all those who are concerned in it should certainly regret that a paper which the accused believed to be essential for his defense, which may for aught that now appears be essential, had been withheld from him. I will not say that this circumstance would in any degree tarnish the reputation of the government; but I will say that it would justly tarnish the reputation of the court which had given its sanction to its being withheld."

Under Section 240 of the Judicial Code, we apply for issuance of a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
June 7, 1944.

AARON M. SARGENT,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the foregoing petition for writ of certiorari is well founded, and that the same is not interposed for purposes of delay.

Dated, San Francisco, California,
June 7, 1944.

AARON M. SARGENT.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1943

No.

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a national banking association), MORTIMER FLEISHHACKER, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, JR., GEORGE I. COCHRAN, PHILIP S. BAKER, R. D. BRIGHAM, WALTER E. BUCK, WALTER A. HAAS, PAUL E. HOOVER, WILLIAM F. HUMPHREY, SAMUEL KAHN, VICTOR KLINKER, WILLIAM B. REIS, PAUL SHOUP, LEON SLOSS, JR., LOUIS SUTTER, ALFRED B. SWINERTON, T. C. TILDEN, JOSEPH O. TOBIN, WILLARD O. WAYMAN, IRENE L. BERG, Executrix of the will of William H. Berg, Deceased, R. STANLEY DOLLAR and FRANK MOSS,
Respondents.

BRIEF IN SUPPORT OF PETITION.

Opinions of Lower Courts.

Circuit Court Opinion (R. 1996) reported at 141 Fed. (2d) 285. Rehearing denied without opinion.

There were two opinions in the District Court, viz.:

On the merits (R. 440)—45 Fed. Supp. 524;

Sustaining jurisdiction—26 Fed. Supp. 240.

Judgments of Lower Courts.

District Court. Decree entered July 2, 1942 (R. 458); motion to vacate denied August 17, 1942 (R. 737); notice of appeal filed September 9, 1942. (R. 746.)

Circuit Court. Judgment entered March 1, 1944 (R. 2004); petition for rehearing in bank denied April 7, 1944. (R. 2061.)

JURISDICTION.

Statement required by Rules 12(1), 27(2c) and 38(2), is presented at page 23 of Certiorari Petition. We adopt same as part of this brief.

STATEMENT OF THE CASE.

This is a derivative suit brought by Ernest H. Denicke on behalf of The Anglo California National Bank of San Francisco. The claims joined involve losses on loans made in violation of 12 USCA 595. The accounts may be grouped under three headings, viz.:

George Shima loans	$1,108,648.17
Empire Farms account	1,293,773.60
Directors' loans	1,626,027.75
Total	$4,029,449.52 (R. 404)

The Shima account represents credits extended to the late George Shima—an alien Japanese—to support a speculation of Herbert Fleishhacker in a tract of unirrigated desert land in Eastern Oregon. Fleishhacker procured bank loans to enable Shima to buy that property; and received a one-third interest as his compensation.

The Empire Farms account represents credits extended in an effort to cover up the fraud. Fleishhacker became executor of the Shima Estate. His position of trust therein, and as president of the bank was abused by drawing the latter into a hopeless reorganization.

During the suit Denicke found that many directors were involved in illegal loans. Liability therefor was protected by amendment.

The parties joined included Herbert Fleishhacker, Mortimer Fleishhacker and Mortimer Fleishhacker, Jr.—liable on the ground of direct participation—also other directors[1] responsible because of abdication and assent to continuing violations of federal banking laws.

---

[1]List of defendants includes persons identified with various financial interests at San Francisco, viz.:
R. Stanley Dollar (of Dollar Steamship Company);
George I. Cochran (former president Pac. Mutual Life Ins. Co.);
Samuel Kahn (president of Market St. Ry. Co.—local utility);
Walter A. Haas (manufacturer and director of S. F. Bank);
Joseph O. Tobin (director Hibernia Savings & Loan Soc.);
Alfred B. Swinerton (contractor);
Paul Shoup (former president Southern Pacific Co.);
Philip S. Baker (vice-president Baker, Hamilton & Pac. Co., wholesalers in hardware and contracting equipment);
Willard O. Wayman (general manager National Fire Ins. Co. of Hartford).
Other defendants are bank employees, viz.:
Leon Sloss, Jr. (son-in-law of Mortimer Fleishhacker);
Victor Klinker (secretary of bank—named as defendant in fraud suit known as *Blum v. Fleishhacker*);
Paul E. Hoover (vice-president—a former bank examiner).

Proceedings in the District Court.

Suit was filed November 7, 1938. Fleishhacker *and the bank* made an attack on the jurisdiction. (R. 926, item 5.) That motion was denied.[2] Then the bank waited while its directors moved to dismiss for failure to state a claim. These motions were denied February 28, 1940. (R. 81.)

Interrogatories were propounded to compel disclosure of directors' loans. (R. 84.) The bank insisted that a reply would reveal affairs of its "customers". It claimed to be a "nominal defendant". Its counsel denied our right to submit interrogatories. Answers were obtained in April, 1941. (R. 191.) These concealed $3,900,000 in directors' accounts.[3]

For more than a year after suit, the bank was represented by counsel also acting for the Fleishhackers.[4] Chickering & Gregory, who were counsel for some of the directors, were substituted in February, 1940 (R. 80), have acted since that date.[5]

There were some shifts in the management. Herbert Fleishhacker was forced to resign one month after suit. His successor, Mortimer Fleishhacker, served until April 1, 1939. Then William H. Thomson was elected. The

---

[2](R. 930, Item 59.) Jurisdiction was sustained on authority of *Chesbrough v. Woodworth*, 244 U.S. 72. Opinion reported as Denicke v. Anglo Bank, 26 Fed. Supp. 240.

[3]The items making up this total concealment are listed at page 15 of the petition.

[4]Messrs. Sullivan, Roche & Johnson, of San Francisco, counsel for Mortimer Fleishhacker and Mortimer Fleishhacker, Jr. (R. 924.)

[5]Chickering was substituted out for directors Hoover (R. 72), Reis (R. 72), Sloss (R. 73), Kahn (R. 75), Neustadt (R. 76), and Wayman (R. 77) in October and November, 1939, and appeared in substitution for Sullivan, Roche & Johnson February 26, 1940. (R. 80.)

"Thomson management" has been in charge since that time.

The first settlement discussion occurred in December, 1939. Thomson and Chickering requested Denicke to agree to a dismissal without enforcement of liability.[6] He refused.

The annual meeting was held a month later. Denicke sought appointment of a special committee to investigate claims. That meeting was controlled by proxy. The resolution was voted down.[7]

Denicke then tried to make his own investigation. His demands were referred to the Chickering office. They were evaded and then denied.[8]

The bank was acting against its interests in other matters at the same time. It appealed a judgment rendered in its favor in *Blum v. Fleishhacker*—a stockholder's suit

---

[6]Conference was held with Thomson and Mr. Lamont of Chickering & Gregory. Lamont admitted that it would be impossible for him to "tell the directors that they were guilty of a violation of duty and to ask them for money"; said he was in no position to make such request. (R. 1506-1507.)

[7]Copy of such resolution appears in exhibit lodged on this appeal containing certified copies of certain papers from case entitled "Denicke v. Fleishhacker", District Court No. 21,161-R. It provided for a committee to examine records and report on the facts. Mr. Denicke would have held a minority position on such committee with power limited to the right to file dissenting report, if not satisfied with the inquiry.

[8]Chickering denied that information about directors' loans was "material" (R. 1558); said such request was not made in "good faith". (R. 1567.) We received a letter containing the following statement:

> "*The present management of the bank, at our suggestion,* has taken the position that what, if any, additional information your client is entitled to should be secured after court order." (Letter February 28, 1940—R. 1562.)

wherein Herbert Fleishhacker had been held for breach of trust in obtaining secret profits.

The Thomson management was requested to stop this activity. (R. 1569.) Thomson wrote, stating that Chickering had just "discovered" the appeal.[9] An explanation was demanded. (R. 1575, 1578.) There was no explanation.

Chickering reopened the discussions in July, 1940. Denicke was requested to approve compromise for a nominal amount. He refused. (R. 1507.)

Discovery was started. Routine information was obtained by depositions under Rule 26 FRCP. The bank was forced to answer interrogatories in April, 1941. (R. 191.)

Chickering then came forward with an offer of $350,000 —tendered for a general release. A petition was filed to compel acceptance. (R. 239.)

A special stockholders' meeting was held shortly afterward. Denicke desired to have a shorthand reporter in attendance. It was necessary to obtain a court order to make that arrangement. (R. 260.) At such meeting, the bank obtained a proxy vote in favor of general settlement.

The petition was heard in July 1941. Proof in opposition to settlement was limited to a prima facie case—

---

[9]Thomson letter of February 29, 1940, states:

"The facts set forth in your letter had already come to the attention of our regular attorneys. The matter has now been placed in their hands and they will proceed to take whatever steps on behalf of the bank they deem advisable in the premises." (R. 1574.)

exact data not being available. (R. 1023, 1224, 1225.) That application was denied in January 1942. (R. 288.)

Discovery was resumed. The bank was ordered to permit examination of ledger cards and other records. (R. 298.) Chickering came forward with a second offer—this time for payment of $200,000 to discharge only claims joined herein.[10] The present appeal concerns that tender.

The bank filed a petition under Rule 23(c) FRCP. (R. 314.) An order to show cause issued. (R. 329.) Petitioners Denicke and Doble each filed objections. (R. 333, 340.)

The bank presented its case on the petition on March 31, 1942. It proved the adoption of resolutions authorizing settlement. The July, 1941 transcript was offered as an exhibit. (R. 1846.) Then counsel rested. (R. 1882.)

Petitioners moved for a nonsuit. (R. 1883.) The Court said no additional evidence was desired. (R. 1888.) Counsel were requested to submit the entire matter. After discussion, the Court *acted on its own initiative. The petition was continued to April 21, 1942, for further hearing.* (R. 1890, 1937, 392.)

There were five subsequent orders. Each postponed the petition to a date. *For three months, that petition was carried on the calendar awaiting trial.* In the meantime,

---

[10]Tender of $200,000 in settlement of claims involved in case at bar. Petition filed March 19, 1942. (R. 314.) The first offer was $350,000 for the settlement of two cases. Pro rata for each was therefore about $175,000. The new petition revealed no real effort to obtain an adequate adjustment.

we carried on discovery. Depositions were taken at Portland, Los Angeles and San Francisco. An audit was completed. Denicke filed amended objections. (R. 403.) Everything was ready for trial. A report was at hand to show the loss, viz.:

	Directors' Loans	
George I. Cochran Corporation	$ 135,255.17	
George I. Cochran	22,188.59	
Sitka Spruce, Pulp & Paper Co.	296,950.39	
Pahrump Valley Company	31,404.86	
Paul Shoup	639,201.34	
R. Stanley Dollar	121,469.70	
Robert Dollar Company	30,559.45	
J. Harold & R. Stanley Dollar	150,854.27	
J. C. McKinstry	117,462.51	
William F. Humphrey	22,886.27	
James Tyson	53,488.37	
R. D. Brigham	5,306.83	
		$1,627,027.75
George Shima Account		1,108,648.17
Empire Farms Account		1,293,773.60
Total loss (R. 404)		$4,029,449.52

Then the Court reversed its position. It had acted on its own initiative in continuing the petition for a further hearing. It now overruled objections and granted the

petition without trial. It acted as on the overruling of a demurrer. Judgment was entered ex parte. (R. 458.)

Petitioners took immediate steps to set aside the decree. They filed:

Demand for a Trial (R. 464);
Motion to Vacate (R. 468);
Supporting Affidavit (R. 471);
Sworn Offers of Proof. (R. 481.)

Mrs. Doble protected her right to act as co-plaintiff. She filed:

Notice of Intervention (R. 466);
Motion for Intervention. (R. 532, Item 2.)

Discovery conducted in April-June, 1942, had clinched the liability. Petitioners acted jointly to avoid loss of rights:

Third Amended Complaint was lodged (R. 536, 537);
Motion for Leave to Amend was filed. (R. 532, Item 1.)

The testimony of *fourteen witnesses* had been protected by depositions under Rule 26 FRCP. We demanded the right to read this proof into the record. (R. 573.)

We also demanded cross-examination of witnesses involved in the settlement negotiations, viz.:

Bank officers. William H. Thomson (President), Allard A. Calkins (1st Vice President) and Paul E. Hoover (Vice President). (R. 573.)

Mortimer Fleishhacker. To compel disclosure of his conference with such parties.

RFC Officials. Emil Schram (former Chairman) and Sam H. Husbands (Director of RFC and of Anglo Bank) involved in the discussions. (R. 580.)

Interrogatories were propounded under Rule 31. These sought to establish transactions before suit. The following persons were named:

J. F. T. O'Connor (former Comptroller of the Currency) (R. 586);

Jesse Jones (former Chairman RFC) (R. 662);

Marriner S. Eccles (Chairman of Federal Reserve) (R. 680);

Leo T. Crowley (Chairman of Federal Deposit Insurance Corp.) (R. 684);

William F. Folger (Chief National Bank Examiner). (R. 693.)

These matters came up August 17, 1942. *The Court denied everything.* (R. 737.) Petitioners were not permitted to vacate—or amend—or read depositions into the record—or introduce an auditor's report—or conduct a cross-examination—or take depositions involving the settlement. *They were prevented from taking any of the steps essential to a fair trial.* The Court granted motions to suppress discovery. (R. 738, Items 1, 3.)

We took an appeal (R. 746) designating the documents filed after judgment. (R. 757-758.) These were excluded from the transcript. (R. 912.)

Proceedings in the Circuit Court.

It became necessary to enlarge the record. A motion for that purpose was granted by Circuit Judges Garrecht, Haney and Healy. (R. 1953.)[11]

The appeal was submitted to Circuit Judges Mathews, Stephens and Healy on February 15, 1944. (R. 1994.) Two weeks later an irregular opinion was filed by Judge Healy. The others refused to sign. (R. 2012.)

We requested reassignment in bank. (R. 2014, 2015.) We do not know whether such application was presented by the clerk, or withheld. It may have been considered. It may have been denied. The docket is incomplete. (R. 2061.)

We petitioned for rehearing in bank—requesting consideration of such petition, in bank. (R. 2015, 2017.) We do not know who considered that petition. Judges Mathews, Stephens and Healy denied it. (R. 2061.)

We moved to vacate the judgment, charging violation of Court rules. (R. 2005.) The same judges denied that motion. (R. 2060.) Judge Mathews said that it was "none of our business" whether the rules had been obeyed. (R. 2058.)

In applying for certiorari, we designated a true copy of the opinion, including the irregular signature clause. (R. 2070, Item 8.) The same judges signed an ex parte

[11]Judge Haney died before appeal was submitted on the merits. Judge Garrecht, who presided on argument of motion to enlarge, was eliminated from the panel by some process of reassignment not disclosed by docket entry. This left Judge Healy. Judges Mathews and Stephens were assigned to sit with him on the merits. These facts are of interest in view of impossibility of obtaining consideration on our application for reassignment in bank.

order to suppress that part of the record. (R. 2066.) A false record was transmitted to the clerk of this Court. The clerk of the Circuit Court certified that such record contained true copies of the originals. (R. 2078.)

We asked for a separately certified copy of the opinion. That document was a public record. The clerk refused to furnish it. We moved for an order. The same judges sat to deny that motion. Judge Mathews refused to entertain the motion. He adjourned Court—permitting no argument.

We come to this Court with a record disclosing failure of the Circuit Court to decide an appeal properly laid before it. In substance, our application to this Court constitutes a petition for appeal with respect to a matter where appellate review has not been granted.

SPECIFICATIONS OF ERRORS.

1. The Circuit Court violated petitioners' rights in making void entries on March 1, 1944. The decree, and all other proceedings noted on said date, should be set aside by the granting of a writ. (R. 1995, 1996, 2004.)

2. There was a denial of due process by the failure of the Circuit Court to decide this appeal—and by the failure of that Court to evidence such decision by an adequate opinion in writing signed by a minimum of two judges.

3. Petitioners were denied due process in the Circuit Court by the arbitrary conduct of Circuit Judges Healy and Mathews disclosed by the record herein.

4. The judgment (R. 458) is void because entered without trial.

5. Said judgment must be set aside under Rule 60b FRCP on the ground of mistake.

6. Said judgment is void because entered without findings.

7. The District Court committed error in refusing to admit the following proof, viz.:

Damage (R. 512, 516); financial responsibility (R. 521); character of liability (R. 545, 484); documentary proof involving directors (R. 490); depositions on file (R. 577, 580, 791, 845, 861, 867, 871); bad faith (R. 482, 522, 528); need for impartial negotiation. (R. 528.)

8. The motion for nonsuit of the petition should have been granted. (R. 1883.) Error was committed in failing to act on such motion.

9. The District Court should have permitted cross-examination of the following bank officers involved in settlement negotiations, viz.:

William H. Thomson, Allard A. Calkins and Paul E. Hoover. (R. 573.)

10. The District Court should have permitted petitioners to take the depositions of Emil Schram and Sam H. Husbands under Rule 26 FRCP. (R. 580.)

11. The District Court should have permitted petitioners to take the depositions of the witnesses O'Connor, Jones, Eccles, Crowley, and Folger, under Rule 31 FRCP. (R. 584, 661, 679, 683, 691.)

12. The District Court should have granted petitioners' motion for leave to file third amended complaint, together with motion of Mary E. Doble for leave to intervene. (R. 532, Items 1, 2.)

I.

Right to Vacate Void Entries in Circuit Court.

The Circuit Courts of Appeals were created by the Act of March 3, 1891. Congress granted:

> ". . . power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law. . . ." (26 Stat. 826, Chapt. 517, Sec. 3.)

The organization date was fixed by joint resolution.[12] Courts were opened simultaneously in all circuits. Associate Justice Field acted on behalf of this Court in organizing the Ninth Circuit. The ceremony was conducted June 16, 1891.[13] An original set of rules was adopted.[14] *For fifty-three years, practice in the Circuit Courts has been governed by rule.*

On November 30, 1936, the Ninth Circuit established a definite procedure for the rendering of an opinion. We quote from that rule:

---

[12]Joint resolution of March 3, 1891 fixed the third Tuesday in June 1891, for the first meeting of the several Circuit Courts of Appeals.

[13]Vol. 1 Minutes (CCA 9) page 1, describes ceremony conducted by Associate Justice Field with Circuit Judge Lorenzo Sawyer, and attended by members of the bar and others.

[14]Uniform set of rules was adopted in all circuits. Minor differences which now exist, are the result of amendment. See 47 Fed. page iii.

> "Appeals shall be deemed decided when announced from the bench in a session of the court at the place of the term in which they are submitted, *or when the signed opinions or other documents evidencing their decision are filed with the clerk.*" (CCA Rule III.)

A document evidencing that amendment was signed by all members of the Court, and duly filed. A copy thereof appears at page 5 of our Petition.

This is the rule which has been violated. The Circuit Court assumed that petitioners had no standing to insist upon compliance. We address ourselves to that question:

Effect of the rule. This amendment prescribes a method whereby two or more judges may render a decision so as to make it binding as the act of the Court. Ordinarily three judges (who are a minority) sit in a particular case. The rule is essentially a *special power of attorney.* It limits the authority of those assigned. It prescribes a method which must be followed if their conduct is to have legal effect.

Power to disregard. Since such amendment was adopted by the signatures of *all judges,* it can be abrogated only with an act of equal dignity. It constitutes a covenant by each judge, made with his associates, for the protection of litigants. On no theory could a violation be condoned by less than a majority.

By law the Circuit Court has a membership of seven. One vacancy was created by death.[15] A minimum of four

[15]Circuit Judge Haney died September 1943—about 6 months before this case was submitted—vacancy remained unfilled. Court had actual membership of six while appeal was pending.

judges would be required to approve the action disclosed on this appeal.

Substantial rights. The rights of litigants are involved in this rule. It fixes the time for certiorari, and for rehearing. It governs issuance of the mandate. It prescribes the duty of the clerk with respect to the entry of judgment and allowance of costs. *In fact, it determines what acts are required to constitute a decision of the Circuit Court.* In view of their interest in the subject matter, petitioners had standing to set aside these entries on motion.

Rules of Court have the effect of law. A litigant is entitled to apply for enforcement. See:

Weil v. Neary, 278 U.S. 160 at 169;

Rio Grande Irrigation Co. v. Gildersleeve, 174 U.S. 603 at 608.

The rule is summarized in *Matter of Giannini, Inc.,* 90 Fed. (2d) 445 at 447, as follows:

> "The cases cited by the Supreme Court in the Neary case for the proposition that an authorized rule of court has the force of law are to the effect that the rule must be applied until repealed by the authority making it; *and hence that a single judge cannot waive a rule not his own.*"

II.

Duty to Render Opinion—Duty to Sign It.

Several distinct questions are presented, viz.:

1. Duty to render a decision in writing;

2. Duty to include in such decision, a sufficient statement to disclose the action taken upon each substantial question raised on appeal;

3. Duty to support such decision by signatures.

It is impossible to deny the duty to decide an appeal. This follows from the jurisdiction conferred by act of Congress (28 USCA 225), and from the principles announced by Chief Justice Marshall in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 at 403.[16]

This requires a decision *of the entire case.* There is no right to decide one part and ignore the rest. Such conduct would amount to a violation of duty. Where the failure to pronounce judgment is flagrant, it will amount to a denial of due process.

Where a general custom prevails in a particular Court —that custom must be followed. It is improper to refuse an opinion to one litigant, when it is the settled practice to render such opinions for the benefit of others.

At the outset, we distinguish between the duty to write an elaborate opinion or legal treatise, and the duty to furnish some written decision on appeal. We stand upon our right to a document sufficient to disclose the action of the Court. We insist upon the right to some memo-

---

[16] "The judiciary cannot, as the legislature may, avoid a measure. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." (19 U.S. 403.)

randum or other writing equivalent to the findings of fact and conclusions of law required of a District Court under Rule 52a FRCP.

In the Ninth Circuit there is a settled practice. All cases are decided by written opinion. Rule 24 of that Court requires the preservation of such opinions for permanent record. A similar requirement was established by the original set of rules adopted in all circuits. (See 47 Fed. xii, Rule 28.) We also have an express requirement for a written opinion supported by signature.

> "Appeals shall be deemed decided . . . when the signed opinions or other documents evidencing their decision are filed with the clerk." (CCA Rule 3—9th Circuit.)

The importance of adequate opinion-writing has been recognized by many leaders of the bench and bar.

> ". . . It is the practice of the Supreme Court to hand down opinions in writing which are summarized orally from the bench by the judges who have written them for the Court. The practice of fully stating the case in the opinion has contributed in no slight degree to the influence and prestige of the Supreme Court.
>
> While terseness is a virtue too often lacking in judicial opinions, there is no better precaution against judicial mistakes than the setting out accurately and adequately the material facts as well as the points to be decided. The method of the Supreme Court is an example to other courts of the country. . . .
>
> Jefferson thought there should be a rule requiring the judges to announce seriatim their opinions

in each case, and thus in a responsible manner take their position. Let every judge, said he, 'throw himself in every case on God and his country; both will excuse him for error and value him for his honesty'. This practice would be impracticable, but *the importance of written opinions as a protection against judicial carelessness and irresponsibility is very great,* and no just complaint can be made that the Supreme Court has failed to maintain this safeguard."[17]

We seek to enforce our right to an adequate memorandum opinion or other document disclosing the action taken on appeal. That right can be reconciled with the need for controlling the size of judicial opinions.

"One may ask why write an opinion at all in cases which involve only questions of law, which are well settled, and thus add to the volume of legal literature material which is of no real value from the point of view of legal history and scholarship. *A partial answer is, of course, that litigants and their counsel are entitled to know the reasons for the decisions of the court.* There is no reason, however, why both would not be willing to have these reasons given in concise memorandum form, and it is quite possible to prepare the memorandum in such form that it would accomplish its purpose, without giving to it any value or influence as a precedent."[18]

---

[17]The Supreme Court of the United States—Charles Evans Hughes (Columbia University Press), pages 64-65.

[18]Law and Its Administration—Harlan F. Stone (Columbia University Press, 1924), page 213.

The American Bar Association has published an exhaustive report on this subject.[19] We quote therefrom:

> "There are dangers to be guarded against in the use of memorandum opinions. This kind of medicine could be worse than the condition it is intended to alleviate . . . The bar has criticized administrative tribunals largely because of too much use of methods similar to the memorandum opinion method. This idea was expressed by Professor Felix Frankfurter (in 1938 before he became a Supreme Court Justice) at an American Bar Association conference on 'Functions and Procedure of Administrative Tribunals', saying: '*Those who decide should record their judgments and give reasons for them,* which in itself will have a fruitful psychological effect. *You feel much more responsible—all of us do—if we have to sit down and write out why we think what we think*'.
>
> The practice in most courts still is to write complete opinions in every case, with statement of facts, issues and reasons for the decision. No doubt lawyers and litigants feel that their cases are given fuller consideration when this is done. *This is fundamental in retaining the confidence of the people in their courts and should not be lightly disregarded.*" (Am. Bar Committee Rep., p. 22.)

---

[19]Report entitled "Methods of Reaching and Preparing Appellate Court Decisions"—published by Judicial Section of Am. Bar Assn.—delivered at annual meeting held August, 1942. The committee consisted of:
Laurance M. Hyde, Commissioner of Missouri Supreme Court;
James P. Alexander, Chief Justice of Texas;
William Denman, Circuit Judge—9th Circuit;
Orie L. Phillips, Senior Judge—10th Circuit;
Royal A. Stone, Justice of Minnesota Supreme Court.

Recently, a committee of the American Bar Association rendered a report concerning standards required in administrative hearings. A tentative bill has been drawn. It is significant that this includes provision for decisions in writing. We quote Section 7(e) thereof:

> "*Findings and Opinions.* All final decisions and determinations, whether of subordinate officers or initially upon review by the ultimate authority within the agency, shall be stated in writing and accompanied by a statement of reasons, findings of fact, and conclusions of law upon all relevant issues raised including matters of administrative discretion as well as of law or fact. The findings and conclusions shall encompass all relevant facts of record and shall themselves be relevant to, and adequately support, the decision and order or award entered."[20]

Importance of Circuit Court Jurisdiction.

The Circuit Courts exercise a jurisdiction whose importance is not equalled by any tribunal except this Court. It includes power to review final judgments from District Courts in forty-eight states and in the territories. (28 USCA 225.) Such Courts also review judgments and orders from important agencies, viz.:

> Bituminous Coal Division (Dept. of Interior); Federal Power Commission, Civil Aeronautics Authority, Federal Alcohol Administration, Federal Communications Commission, Federal Security Agency, Federal Trade Commission, National Labor Relations Board, Processing Tax Board of Review, Secretary of Agriculture, Securities and Exchange Commission,

---

[20]Federal Administrative Procedure Act—proposed by American Bar Association. March 1944. See Am. Bar Jour. issue of April, 1944, page 228.

Tax Appeals Board, Wages and Hours Administration.

The Circuit Courts have become Courts of last resort in ninety-five per cent of all cases.[21] Certiorari is intended to cover limited subjects. (Rule 38.) In common law and diversity cases the Circuit Court is, to an even greater extent, the Court of last resort.

Administrative agencies are required to make adequate findings. So are the District Courts. (Rule 52a FRCP.) Strict compliance is enforced. *The opinion of a Circuit Court constitutes the finding of that Court. Its opinion must measure up to the standards required of all other Courts.*

This Court cannot give proper attention to certiorari matters without adequate opinions. There is no other way to pass upon the number of petitions filed annually. If loose standards are permitted it will be necessary to go back to the record in every case. *The burden of work that should be carried in ten circuits, will fall upon the shoulders of one Court.*

Duty to sign opinion. This obligation is clear. A rule of Court so provides. It is a rule designed to prevent irresponsible action by a clerk during adjournment. It is intended to assure litigants that judgments so entered, are in fact the judgment of the Court. Disregard of that rule violated a substantial right.

---

[21]Report of Will Shafroth, Chief of Division of Procedural Studies and Statistics. Published in Annual Report of Director of Administrative Office of U. S. Courts (year 1941), page 45.

III.

Reversal for Failure to Make Findings.

The District Court did not pretend to comply with Rule 52a FRCP. It filed an order "overruling" objections to a settlement. (R. 438.) A judgment was signed and filed ex parte. (R. 458.) This contained a general recital in favor of the bank.[22] It disclosed a refusal to find, even by *recital,* on the issues raised by objection.[23] There was an opinion containing a general discussion of the case. (R. 440.) This was indefinite. Under the decisions of this Court, it was not equivalent to findings required by Rule 52a FRCP.

Factual issues were raised by objections. The following matters should have been settled:

Amount of damage (R. 335; 342; 404);

Persons involved (R. 409);

Nature and extent of primary liability (R. 406-409);

Financial responsibility (R. 421);

Collusion involving settlement negotiations (R. 336, Item 8, 343, 422-424);

Facts supporting derivative status and right to control the litigation (R. 333, Item 2; 426, Items 1 and 2);

---

[22]Judgment states "that said defendant Anglo Bank and its representatives in filing said petition have acted in good faith and for the best interests of said Anglo Bank and its shareholders. . . . That it is for the best interests of the defendant Anglo Bank and its shareholders that the above entitled action be dismissed." (R. 459-460.)

[23]Recital in the judgment discloses a refusal to find on issues raised by objection. "The only objections filed to said petition were those of the plaintiff, Ernest H. Denieke and Mary E. Doble, a shareholder, both being represented by the attorney for the plaintiff; *that all of said objections are without merit.*" (R. 459.)

Facts showing want of capacity in bank to maintain a petition. (R. 334, Item 5; 341, Item 4; 427, Item 6.)

The District Court refused to comply with the following decisions of this Court:

Mayo v. Canning Co., 309 U.S. 310 at 316;[24]

Interstate Circuit, Inc. v. United States, 304 U.S. 55 at 56;[25]

Kelley v. Everglades District, 319 U.S. 415 at 420 (composition plan arising in bankruptcy);

Securities and Exchange Commission v. Chenery Corporation, 318 U.S. 80 at 94 (review of an order involving merger of utilities);

Consolidated Rock Products Co. v. DuBois, 312 U.S. 510 at 525 (reorganization under 77B);

Wichita Royalty Co. v. City National Bank, Wichita Falls, 306 U.S. 103 at 110 (equity matter).

Petitioners were entitled to enforce compliance with Rule 52a FRCP and with these decisions.

The Circuit Court violated its duty in sanctioning this flagrant disregard of precedent. This error raises a question of paramount importance, viz.: Duty to maintain

---

[24] "The observations made in the course of the opinion are not, in any proper sense, findings of fact upon these vital issues. Statements of fact are mingled with arguments and inferences for which we find no sufficient basis either in the affidavits or the oral testimony."

[25] "The opinion of the Court was not a substitute for the required findings. A discussion of portions of the evidence and the Court's reasoning in its opinion do not constitute the special and formal findings by which it is the duty of the Court appropriately and specifically to determine all the issues which the case presents. This is an essential aid to the Appellate Court in reviewing an equity case. . . ."

precedents, and the duty to enforce compliance therewith. We cite the opinion of Justice Roberts in ***Mahnich*** *v. Southern Steamship Co.* (Oct. Term 1943, No. 200):

> "The evil resulting from overruling earlier considered decisions must be evident. In the present case, the court below naturally felt bound to follow and apply the law as clearly announced by this Court. If litigants and lower federal courts are not to do so, the law becomes not a chart to govern conduct but a game of chance; instead of settling rights and liabilities it unsettles them. Counsel and parties will bring and prosecute actions in the teeth of the decisions that such actions are not maintainable on the not improbable chance that the asserted rule will be thrown overboard. Defendants will not know whether to litigate or to settle for they will have no assurance that a declared rule will be followed. But the more deplorable consequence will inevitably be that the administration of justice will fall into disrepute. Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy."

It is a serious matter to permit disregard of precedent. This is particularly true where the subject concerns enforcement of adequate procedure in lower Federal Courts which are directly under the supervision of this Court.

> "I can not believe that any person who at all values the judicial process or distinguishes its method and philosophy from those of the political and legislative process would abandon or substantially impair the rule of *stare decisis*. . . . To overrule an important precedent is serious business. It calls for sober appraisal of the disadvantages of the innovation as

well as those of the questioned case, a weighing of practical effects of one against the other."[26]

The Circuit and District Courts are bound by the precedent. The duty to follow such rulings is absolute. See,

California Water Service Co. v. City of Redding, 304 U.S. 252.

There is only one brand of law. It applies equally to all litigants. Petitioners were entitled to invoke the jurisdiction of the Circuit Court. It was the duty of that Court to follow decisions of this Court. For a violation of that duty, a writ should issue.

IV.

Reversal of Judgment Entered Without Trial.

The District Court did not pretend to grant a hearing. It *overruled* objections. It entered a judgment *ex parte.* This decree was void on its face. Where such error is shown there is prejudice as a matter of law. Reversal is mandatory. See:

Alford v. United States, 282 U.S. 687 at 692;
Brassfield v. United States, 272 U.S. 448.

This Court has jealously guarded the rights of persons subjected to judgment without trial.[27] In civil and criminal

---

[26]Address delivered by Honorable Robert H Jackson before annual meeting of American Law Institute at Philadelphia—May 9, 1944.

[27]*Powell v. Alabama,* 287 U.S. 45; *Norris v. Alabama,* 294 U.S. 587; *Morgan v. United States,* 304 U.S. 1; *Johnson v. Zerbst,* 304 U.S. 458; *Bruno v. United States,* 308 U.S. 287; *Avery v. Alabama,* 308 U.S. 444; *Smith v. Texas,* 311 U.S. 128; *Smith v. O'Grady,* 312 U.S. 329; *Hill v. Texas,* 316 U.S. 400; *Ward v. Texas,* 316 U.S. 547.

proceedings there is the same right to due process of law. We cite:

Glasser v. United States, 315 U.S. 60 at 69-70.

"The guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power. . . . A federal court cannot constitutionally deprive an accused . . . whose life or liberty is at stake, of the assistance of counsel. . . . The Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired." (315 U.S. 69-70.)

"To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart . . . is at once difficult and unnecessary. *The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.*" (315 U.S. 75-76.)

A writ should issue to secure petitioners' right to a trial—as guaranteed by the Bill of Rights.

V.

Right to Vacate Decree on the Ground of Mistake.

The District Court had no discretion under Rule 60(b) FRCP. We quote:

"On motion the court, upon such terms as are just, may relieve a party . . . from a judgment, order, or proceeding taken against him through his mistake . . . surprise, or excusable neglect."

The "discretion" granted by that rule was governed by the due process clause of the Fifth Amendment. There was a conclusive showing of prejudice, accompanied by a reliance upon minute entries made by the District Court acting on its own initiative. This error requires issuance of a writ.

VI.

Standards Governing Approval of a Settlement Under Rule 23(c) FRCP.

There is no essential difference between the rule recognized in Chandler Act cases, and the principles which should apply to the compromise of a stockholder's suit. We cite the opinion of Justice Brandeis in *National Surety Co. v. Coriell*, 289 U.S. 426:

> ". . . *Creditors were entitled to have the plan and their objections considered in an orderly way and to a decree based on adequate data.* The district court had before it, in support of the plan, only informal, inadequate and conflicting ex parte assertions unsupported by testimony. It undertook to pass upon the wisdom and fairness of the plan of reorganization, and the rights of non-assenting creditors.
>
> For the proper disposition of these questions *definite, detailed, and authentic information was essential.* Such information was wholly lacking. . . . There was no valuation of the assets by a disinterested appraiser; no account of the operations; . . . and no dependable schedule of liabilities of the corporation showing the number of creditors, the amount owed to each and the collateral held . . .
>
> The failure to require relevant data before deciding whether the plan should be approved was not

cured by the declaration of the Circuit Court of Appeals that the dissenting creditors were entitled to an aliquot share of what, a year later, it might be estimated the property would have brought at a public sale. . . .

Every important determination by the court in receivership proceedings calls for an informed, independent judgment." (289 U.S. 435-436.)

The rule was restated in *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106:

"*We think that as a matter of law the plan was not fair and equitable.* . . . Where a plan is not fair and equitable as a matter of law, it cannot be approved by the court even though the percentage of the various classes of security holders required by Sec. 77B(f) for confirmation of the plan has consented . . .

The court is not merely a ministerial register of the vote of the several classes of security holders. All those interested in the estate are entitled to the court's protection. Accordingly, the fact that the vast majority of the security holders have approved the plan is not the test of whether the plan is a fair and equitable one.

The contrary conclusion in such cases would make the judicial determination on the issue of fairness a mere formality and would effectively destroy the function and the duty imposed by Congress on the District Courts under Sec. 77B.

Submission to coercion is not the application of 'fair and equitable' standards. Such a proposition would not only drastically impair the standards of 'fair and equitable' as used in Sec. 77B; it would pervert the function of that Act." (308 U.S. 114, 115, 123.)

We also cite:

Consolidated Rock Products Co. v. DuBois, 312 U.S. 510;

Securities and Exchange Commission v. United States Realty & Improvement Co., 310 U.S. 434;

Kelley v. Everglades District, 319 U.S. 415.

In the Sixth Circuit, a similar rule was applied to a proceeding under Rule 23(c) FRCP. See,

Cohen v. Young, 127 Fed. (2d) 721,

where the Court said:

> "Rule 23(c) does not justify approval of a proposed compromise of a class action solely upon the recommendation of attorneys even though they represent all parties of record. The rule provides for notice to stockholders not only in order that they may have the right to be heard but also in order that the court may have the benefit of that broader information which comes from receiving advice as to the views of all parties concerned and from considering evidence proffered by them upon the relevant points of the case. In other words, the rule was adopted to secure not routine approval of a consent decree, but in order to insure supervision of the court for the protection of the corporation and all the stockholders." (127 Fed. (2d) 725.)

The Court held that evidence to sustain a settlement should be put into the record—that the district judge was bound to consider available proof before passing upon the plan:

> "*The documents relied upon by the attorneys should have been incorporated in the record.* The appellant had a right to invoke the discretion of the court to decide whether the compromise recom-

mended did in fact protect the interest of the corporation and of the stockholders." (127 Fed. (2d) 725.)

"It was the duty of the court to consider the available evidence in this light, and its refusal or failure to consider it on the ground that it had no power or discretion so to do deprived appellant of a substantial right." (127 Fed. (2d) 725.)

In the Ninth Circuit, the approval of a settlement has been left to the uncontrolled discretion of a district judge. A writ should issue to correct the miscarriage of justice which has resulted.

VII.

Right to a Nonsuit of the Petition.

Our case is controlled by the decision of this Court in *Delaware & Hudson Co. v. Albany & Susquehanna Railroad Co.*, 213 U.S. 435, where Justice McKenna laid down the following rules:

"There was no compliance with the requirements of Rule 94, as expressed in its letter . . . The bill seemed to show a case not of compliance with the requirements of Rule 94, but circumstances which excused from such compliance." (213 U.S. 449.)

"The situation was unique. The company whose interest it was to assert the right to payment and to demand it was under the control or could be influenced by the company whose interest it was to deny indebtedness and resist payment. . . . It was certainly natural enough that a stockholder should seek more earnest representatives . . ." (213 U.S. 451.)

And in *Doctor v. Harrington*, 196 U.S. 579, this Court held that a corporation made defendant in a derivative suit must be aligned to conform with its conduct; that it will be treated as a real defendant where acting against the interests of its stockholders. We quote from the opinion of Justice McKenna in that case:

> "The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic to him, and made to act in a way detrimental to his rights. In other words, his interests, and the interests of the corporation, may be made subservient to some illegal purpose. If a controversy hence arise . . . it can be litigated in a federal court." (196 U.S. 587.)

Modern conditions have given these opinions more significance. A meeting of stockholders is no longer a democratic affair. It is not attended by men who are the owners of the business. The stockholders do not gather as in a New England town meeting. Large blocks of stock are voted by proxy. Ownership (held by stockholders) has been divorced from actual control (as held by management). The managing officers of most concerns have little or no investment at stake. Their principal interest lies in salaries and continuance of their employment. These changes are significant. The public is greatly concerned over that problem today.

> "The shareholder in the modern corporate situation has surrendered a set of *definite rights* for a set of *indefinite expectations*. The whole effect of the growth of powers of directors and 'control' has been steadily to diminish the number of things on which a shareholder can count; the number of demands

> which he can make with any assurance that they must be satisfied . . . *The shareholder is therefore left as a matter of law with little more than the loose expectation that a group of men, under a nominal duty to run the enterprise for his benefit . . . will actually observe this obligation. . . .*"[28]

A corporation is a legal fiction. The law is not interested in sophistry. It regards the conduct of the men in control.

> "Frequently lawyers' fictions . . . are employed as a screen to cover up a retreat. To regard a giant corporation, with its stockholders, directors and employees, as a single person is a useful and convenient fiction to enable the corporation to sue and be sued as simply as any individual; but to maintain that a worker dealing with his corporation is dealing simply with another individual like himself is to pervert a fiction as only a legal mind could do with solemnity."[29]

Stockholders are widely scattered. A dangerous condition has been created.

> "The wide distribution of stock, instead of being a blessing, constitutes, to my mind, one of the gravest dangers to the community. It is absentee landlordism of the worst kind. . . . Such a wide distribution of the stock dissipates altogether the responsibility of stockholders, particularly of those with five shares, ten shares, fifteen shares, or fifty shares. They recognize that they have no influence in a cor-

---

[28]The Modern Corporation and Private Property—Berle & Means, pages 277, 278.

[29]The Struggle for Judicial Supremacy—Robert H. Jackson (Alfred A. Knopf, 1941), pages 293-294.

> poration of hundreds of millions of dollars capital. Consequently they consider it immaterial whatever they do, or omit to do; the net result is that the men who are in control become almost impossible to dislodge, unless there should be such a scandal in the corporation as to make it clearly necessary for the people on the outside to combine for self-protection."[30]

There has never been a time when a sense of trusteeship was more important.

> "Responsible management has always recognized its position as the servant of the stockholders. Yet the blight of capitalism has been a specious brand of morality for corporations, a morality which drew a distinction between the allegiance which the management demanded of its staff and the allegiance which the management owed to its stockholders. There can be no such distinction. Once capitalism forsakes the standards of trusteeship, it bids fair to destroy itself."[31]

There has never been a time when investors were more in need of the protection afforded by a Court of Equity. The rule in the *Delaware & Hudson* and *Harrington* cases should be extended.

The District Court committed flagrant error in failing to act on the motion for nonsuit. We submit that such motion should have been granted; and that this error requires issuance of a writ.

---

[30]Statement of Louis D. Brandeis before Commission on Industrial Relations of 64th Congress, 1st Session, printed in Senate Document, Vol. XXVI P. 7661 (1915).

[31]Democracy and Finance—William O. Douglas, page 56.

VIII.

Duty to Follow Local Decisions Recognizing Property Right Sufficient to Support Derivative Suit.

The Circuit Court and the District Court treated petitioners as having no greater right than that held by a guardian *ad litem*. The bank was allowed to supplant them by filing a petition. There was a flagrant refusal to follow local decisions which are controlling. We cite:

Klopstock v. Superior Court, 17 Cal. (2d) 13 at 16, 17, 108 Pac. (2d) 906 (decided Jan. 10, 1941, where the Court said:

> "A stockholder's representative suit has been called a 'derivative action' for the reason that the wrong to be redressed is one against the corporation, and normally the corporation would bring the suit. Where, however, the corporation fails or refuses to act after proper demand, the stockholders' ultimate interest in the corporation is sufficient to justify the bringing of a 'propulsive' action, designed to set in motion the judicial machinery for the redress of the wrong to the corporation . . .
>
> If the stockholder dies, the legal representative of his estate obtains the authority and powers of the stockholder during the time of administration, including the possession and control of the property . . . and may sue in his stead on causes of action which the deceased stockholder had at the time of his death . . .
>
> Thus, in the original action, the suit on behalf of the corporation should have been brought by the legal representative of the deceased stockholder . . . and neither a legatee nor anyone representing the

> legatee . . . was entitled to bring the derivative action to redress the wrong to the corporation, prior to the actual distribution of such shares to the legatees' estate.
>
> *It is contended that this defect was merely one of lack of capacity to sue . . . We do not believe that this accurately states the nature of the defect. If it were lack of capacity to sue, the defect would have been waived by a failure to demur to it specially* . . . A demurrer for lack of capacity to sue raises only the question of whether the plaintiff is free from general disabilities, such as infancy or insanity, or if he sues in a representative capacity, that he actually possesses the character in which he sues."

We also cite *Eggers v. National Radio Co.*, 208 Cal. 308, at 313-314, 281 Pac. 58 (decided Sept. 30, 1929), where the Court said:

> " '. . . where a corporation refuses to defend an action, or, having begun a defense, it is made to appear that the corporation will not press it in good faith, a stockholder may, upon a proper application showing the facts, be allowed to become a party and defend on behalf of the corporation, but he must show that he cannot induce those in control to do that which is fair and right.' (Difani v. Riverside Oil Co., supra; Favorite v. Superior Court, 181 Cal. 261, 8 ALR 290, 184 Pac. 15.) The requirement that a demand must be made upon the board of directors to defend, or continue the defense, of an action pending against a corporation is not a necessary prerequisite to an intervention by the stockholders where, as here, the facts alleged in the complaint in intervention are such as to render such a request useless . . .

> The peculiar nature of this action and the failure of the corporation defendant to defend against it, after having secured an order granting a new trial . . . are such, in our opinion, as to make this a proper case for an intervention by those stockholders opposed to the passive stand of the governing body of the corporate entity. . . .
>
> In such case, and particularly when the corporation neglects and fails to defend against the plaintiffs' claim, 'there can be no doubt of the right of a stockholder to intervene'. (Shively v. Eureka Min. Co., 123 Cal. 293.) It would be a reproach to the law if the stockholders in such a case as this were remediless."

A guardian *ad litem* acquires his status by an order of Court. He is subject to removal. He may be supplanted whenever a new guardian is put in. His death transfers nothing to his executor, or to his estate. He acts for a third party—not for himself.

A plaintiff shareholder occupies a different position. He represents *himself*, and *all others similarly situated*. He has a dual status. His rights pass, on death, to his executor and to his estate. The corporation has no right to supplant him by any act on its part. The Court has no power to remove him.

The Circuit Court misapplied the rule in *Erie RR Co. v. Tompkins*, 304 U.S. 64. The bank could only obtain realignment by complying with Federal Rules of Civil Procedure. It should have answered under Rule 12(a) —and then stood trial on the facts governing derivative status.

The bank has consistently refused to plead. It has drifted from one position to another—throughout the course of the litigation. At times it pretended to be a "nominal defendant" with the rights of a plaintiff; on other occasions it would act like a defendant in order to resist investigation into its conduct.

IX.

Right to Amend and Intervene.

Within ten days of entry of the ex parte decree, petitioners lodged a third amended complaint with motion for leave to file. (R. 536, 537, 532, Item 1.) This sought to protect liability on the facts developed by discovery, viz.:

Actual damage—stating a loss exceeding four million dollars. (R. 549, 555, 557.)

Derivative facts—a specific statement of the facts bringing this matter within the *Delaware & Hudson* and *Harrington* cases. (R. 560-569.)

Extent of directors' liability—provision for allocation among parties joined. (R. 545, 555, 559.)

Shima account—statement of facts in accordance with depositions taken at Portland, Los Angeles and San Francisco. (R. 546-549.)

Empire Farms account—restatement of the facts supporting liability. (R. 549-555.)

Directors' loans—exact statement of the amount, with facts showing liability therefor. (R. 555-560.)

Prior pleadings had been in skeleton form. The original complaint was amended to meet an attack on the jurisdiction. (R. 926, Item 10.) The second amended complaint (R. 6) was filed when defendants moved to dismiss for failure to state a claim. (R. 932, Item 84.) A skeleton amendment to protect the case on directors' loans was filed February 20, 1942. (R. 290.)

Petitioners were never able to file a pleading containing the facts developed by discovery. They were impeded at every step by conduct of the bank. Ledger cards and material documents were suppressed. It was necessary to use discovery first and amend afterwards.

Mrs. Doble sought to intervene (R. 466), to protect her right to act as co-plaintiff. In denying amendment and intervention, the District Court violated rights essential to a fair trial. The right to a hearing carries with it, the right to file a pleading setting forth the matters which are to be presented.

X.

Right to Cross-examine Bank Officers Who Handled the Negotiations.

This settlement was the result of conferences between Chickering & Gregory and bank officers—particularly William H. Thomson (president), Allard A. Calkins (1st vice president), and Paul E. Hoover (vice president). We demanded the right to cross-examine them in open

Court.[32] Their testimony would have covered the following data assembled while objections were on the calendar awaiting trial, viz.:

Misrepresentation of the loss. The settlement appeared to be an adjustment at roughly fifty per cent. Actually, it represented five cents on the dollar. *The misrepresentation amounted to three million six hundred thousand dollars.*[33]

Suppression of Documents. The bank files contained seventy-five letters of complaint received from the Comptroller of the Currency before suit. In July, 1941, Chickering had denied the existence of such evidence. We were entitled to expose the persons responsible for that fraud.[34]

Disqualification of bank counsel. For three years the bank had insisted upon handling negotiations through

---

[32]Demand filed August 8, 1942 (R. 573); denied by Minute Order August 17, 1942. (R. 737 at 738, Item 6.)

[33]It is necessary to guess at the loss assumed by the District Court. The opinion, which is quite vague, suggests a loss of $421,601.64 on the Empire Farms account—no loss on Shima loans—and no mention of any damage on loans extended to directors. (See R. 446.) $200,000 was tendered in settlement, which would be roughly fifty per cent of the write-off on the Empire Farms account. Our audit completed in May, 1942, fixed the actual loss at $4,029,449.52. (R. 404.) Thomson, Calkins and Hoover had access to the ledger cards disclosing this fact. It was proper to determine why this vital fact was not revealed to the District Court.

[34]In July, 1941, Mr. Williams, of the Chickering office, denied in open Court, that the bank had any letters from the Comptroller other than those already furnished under process. (R. 1687-1688.) On March 30, 1942, we obtained a Court order compelling production of seventy-five separate letters of that kind. (R. 365 at 367-380.)

counsel who had acted in the defense of directors and executive committee members joined in this suit. It had become proper to inquire into that situation. The representation of conflicting interests is contrary to the most elementary concept of professional ethics.

> "It is unprofessional to represent conflicting interests, except by the express *consent of all concerned* given after a full disclosure of the facts. Within the meaning of this canon a lawyer represents conflicting interests *when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.*" (No. 6 of Canons of Professional Ethics of Am. Bar Assn.)

Such conduct has been condemned in reorganization matters:

> ". . . Where a house of issue has undertaken to discharge its 'moral obligation' to security holders by forming a protective committee, we often find its counsel has become counsel to the committee. . . . We frequently see that one of the grave risks of the bankers is that security holders may sue them in fraud . . . Bankers in control of a committee may be able to suppress or thwart such attempts . . .
>
> The officers and directors may be legally responsible to the corporation for their wrongful acts . . . From the selfish viewpoint of the management it will be desirable to have any investigation or suit stifled. The lawyer in this dual position cannot serve both masters with undiluted loyalty.
>
> It is disturbing to see this condition . . . It is a danger sign to all those who are genuinely interested in preserving capitalism. It is a particularly danger-

ous trend because the lawyers, who are officers of the court, not only participate in it; they are at times its guiding and controlling influence . . . They are willing not only to become, as Mr. Justice Stone has said, 'the obsequious servant of business', they have neglected the element of public trust inherent in their profession."[35]

Disclosure made in Circuit Court.

Chickering filed a reply brief on behalf of the bank. This revealed that negotiations for a settlement had never been conducted with any one *except two attorneys* who represented only *three of the defendants.*[36]

The others, *comprising a group of twenty solvent parties,* had received the equivalent of immunity.

A former Chickering client—Executive Committeeman Willard O. Wayman—had gone around to receive "voluntary contributions".[37]

---

[35]Democracy and Finance—Douglas, pages 234, 235, 239.

[36]Reply Brief filed by Chickering in Circuit Court contains the following statement:

"No negotiations have ever been conducted by bank's counsel with said defendants or their representatives in so far as their liabilities are concerned. The only negotiations conducted by Messrs. Chickering & Gregory with any of the defendants in said case were those with Mr. Mortimer Fleishhacker, Mr. Herbert Fleishhacker and Mr. Mortimer Fleishhacker, Jr., and their attorneys." (R. 2036.)

"It is difficult to see what possible bearing the former representation of Messrs. Chickering & Gregory of certain of the defendants in this case can have upon the matters before this Court." (R. 2037.)

[37]Chickering Brief in CCA states:

"The sum of $50,000, offered in compromise by attorney John C. Altman was raised through the efforts of Mr. Willard O. Wayman." (R. 2037.) The total liability exceeded $4,000,000—hence, this "contribution" was less than one per cent for a group of twenty directors.

XI.

Right to Take Depositions of Witnesses Schram and Husbands Under Rule 26 FRCP.

Petitioners demanded the right to cross-examine the witness Emil Schram with respect to the following letter (R. 580 at 582):

"Reconstruction Finance Corporation
Washington

Emil Schram
Chairman of the Board

Oct. 19, 1939

Mr. Aaron Sargent
Hobart Building
San Francisco, California.

Re: Anglo California National Bank
San Francisco, California

Dear Sir:

Replying to your letter of October 13th, I wish to advise that *it is the policy of the Reconstruction Finance Corporation to refrain from interfering in the detail operation of a bank whose preferred stock it owns.* If management of such a bank is unsatisfactory, this Corporation uses any right it has to try to bring about necessary corrections.

In view of the changes in management of the subject institution which have recently been made, we feel that its *operations are in the hands of a board of directors and chief executive officer, who are using their best efforts to protect the interests of all stockholders.*

Yours very truly,
Emil Schram
Chairman." (R. 582.)

The witness Sam H. Husbands was a director of RFC and also a director of the bank. Thomson consulted with him before "approving" the settlement. (R. 773.) We sought to examine him under Rule 26 FRCP. (R. 580.)

Demands for the testimony of both witnesses were denied August 17, 1942. (R. 738, Item 5.)

XII.

Right to Take Depositions of Federal Officials Under Rule 31 FRCP.

Interrogatories were propounded to J. F. T. O'Connor, Marriner S. Eccles, Leo T. Crowley, William F. Folger and Jesse Jones. (R. 584, 680, 684, 693 and 662.) These were filed to establish transactions before suit. That proof was material on several grounds, viz.:

1. To establish the flagrant character of the liability.

2. To show that the bank's representatives had knowledge of the guilt of the parties to be released.

3. To compare an apparent failure in law enforcement before suit—with a failure to enforce liability after suit.

Interrogatories to J. F. T. O'Connor.

Witness was Comptroller of the Currency—1933-1938 inclusive. The following testimony was sought:

Conditions at Anglo Bank in May, 1933—persons having knowledge thereof. (R. 589.)

Similar condition in March, 1934—persons affected. (R. 596.)

That complaint was lodged with directors on May 1, 1935, which included reference to

> "The undesirable asset condition existing in your bank and the urgent need . . . for effective work in the way of relieving it. . . ." (R. 600.)

That such report required advice "every thirty days . . . over the signatures of the directors"; and that no action was taken to enforce that requirement. (R. 600-602.)

Reasons for failure to correct such condition. (R. 603.)

Receipt of a false letter of reply from vice-president Paul Hoover bearing on this matter. (R. 605.)

Complaint sent to directors October 22, 1935—reference therein to serious problem created by directors' loans,[38] viz. (R. 607):

Fleishhacker indebtedness	$13,442,109.82
Dollar accounts	6,182,616.39

Unsound conditions as of December 19, 1935. (R. 618-623.)

Conference with Mortimer Fleishhacker at Comptroller's office in November, 1936. (R. 647.)

---

[38]Includes credit lines of Herbert and Mortimer Fleishhacker, who were respectively president and chairman of the board—also various corporations in which they were interested. Many of the directors were involved in the same situations. The Dollar account included indebtedness of director R. Stanley Dollar, the family corporation—Robert Dollar Co.—and various matters. Other directors were involved in these situations. Schedules describing these accounts are attached to the O'Connor interrogatories. See R. 620-623, 626, 628.

Whether complaint was ever lodged with Federal Reserve under 12 USCA 77 to secure removal of bank officers responsible for mismanagement. (R. 647-648.)

Complaint to directors on December 21, 1937, containing reference to

> "The lack of progress *during the last eighteen months* . . . (with request) . . . to consider . . . letter at the next regular meeting of the board and to reply in detail over the signatures of the attending members." (R. 649, 654.)

Persons responsible for failure to enforce Federal Banking Laws as against the Anglo management during the period 1933-1938. (R. 658-659.)

Duties of Comptroller of the Currency.

The Comptroller is head of a bureau in the Treasury Department charged with enforcement of all laws affecting national banks (12 USCA 1). He appoints the federal examiners. (12 USCA 481.) National banks are examined twice a year. The Comptroller receives reports of such examinations. In 1933, he was given power to lodge complaints with the Federal Reserve, in order to obtain removal of bank officers engaged in unlawful or unsound practices. (12 USCA 77.)

Interrogatories to Marriner S. Eccles.

This witness has been Chairman of the Board of Governors of the Federal Reserve System since August 23, 1935. The Anglo, being a national bank, is automatically a member bank. (12 USCA 282.) We sought to propound the following questions:

Whether Federal Reserve Board was unsuccessful in obtaining cooperation from other agencies in correcting conditions at the Anglo Bank. (R. 682.)

Reasons for any such failure on the part of other agencies having jurisdiction—persons responsible. (R. 682.)

Whether Federal Reserve took any steps on its own behalf—what resulted therefrom. (R. 681-682.)

Duties of Federal Reserve.

The Board has independent power to examine all member banks, including national banks, when investigations by the Comptroller are not deemed sufficient. (12 USCA 483.) To avoid duplication, it is the practice of the Comptroller to send copies of all reports to the Federal Reserve.

The Board has independent power to receive complaints and remove officers. (12 USCA 77.)

Interrogatories to Leo T. Crowley.

This witness has been chairman of Federal Deposit Insurance Corporation since February 1, 1934. That agency insures deposits of all national banks. We sought to propound the following questions:

Procedure used by FDIC in correcting unsound conditions in an insured bank. (R. 686-690.)[39] That such powers have been exercised in other cases. (R. 688, 690.)

---

[39]Witness is requested to confirm the following, as usual practice:

Notice to Comptroller; 120 days for correction; re-examination of bank to determine that violations of law have ceased; notice of intent to terminate insured status; hearing before FDIC board covering subjects of complaint; a final opportunity to obey the law, followed by a termination of insured status.

Whether FDIC lodged any complaint with the Comptroller or took other action to correct conditions at the Anglo between 1934 and 1938. (R. 691.)

Reasons for any refusal to act—persons responsible. (R. 691.)

Duties of FDIC.

This agency has access to all reports of the Comptroller, with independent power to inquire into the condition of any insured bank.[40] It received copies of all reports concerning Anglo. Power to take disciplinary action is granted by 12 USCA 264i.

Interrogatories to William F. Folger.

This witness is Chief National Bank Examiner. Questions were propounded to show custody of documents within the scope of a subpoena *duces tecum*. We sought a description of the following:

Correspondence with Fleishhacker management involving complaints. (R. 697.)

Correspondence with other agencies involving criticism of the condition of respondent bank. (R. 698.)

Documents showing complaints made by the Comptroller to other agencies. (R. 699.)

Documents showing complaints to Comptroller from other agencies. (R. 700.)

---

[40]12 USCA 264k, sub. 4, gives access to Comptroller's reports; and subdivision 2 of that section provides for appointment of its own staff with power to act independently.

Interrogatories to Jesse Jones.

This witness is Secretary of Commerce. By Executive Order, that department has jurisdiction of all federal lending agencies. This includes RFC. Witness was Chairman of RFC 1933-1938; was then appointed Federal Loan Administrator.

The Reconstruction Finance Corporation became interested in the affairs of the Anglo Bank in June, 1933. It granted a loan on sub-standard assets, and also provided part of the funds needed for an issue of preferred stock.[41] These transactions resulted in the delivery of documents establishing control over the management.[42] The bank issued the following instruction:

"July 11, 1933

To the Comptroller of the Currency,
Washington, D.C.

Sir:

You are requested and this letter will be your authority to furnish the Reconstruction Finance Corporation, at our expense, *full and complete copies of all reports of examination* of this institution here-

---

[41]$35,000,000 loan granted to bank affiliate, Progress Mortgage Company, secured by pledge of sub-standard assets; separate loan granted to a concern known as September Company to cover purchase price of $2,500,000 of preferred stock. This was a collateralized loan under 12 USCA 51d.

[42]Interrogatories to Jones describe the following:

(1) Letter signed by Herbert and Mortimer Fleishhacker (June 28, 1933) granting the right to vote all preferred shares held by said parties in the bank. Letter contains covenant to elect designated directors and to permit RFC to nominate first vice-president. (R. 673-675.)

(2) Letter from bank to RFC authorizing auditing of books and records—and limiting compensation of officers to sums approved by such agency. (R. 672-673.)

In December, 1938, the old preferred stock was redeemed. A new issue was created in a larger amount. RFC continued to occupy a proprietary relation.

after prepared by your office. You are also requested and authorized to deliver to the Reconstruction Finance Corporation *copies of all letters sent to this bank by your office relating to such examination.*

This letter is to be in full force and effect until revoked in writing by this bank and the Reconstruction Finance Corporation.

Very truly yours,

The Anglo California National Bank of San Francisco

By .....

Its President.

Attest:

Cashier....." (R. 660.)

That letter was uncovered by an examination of the minute book made in the spring of 1942. Access was obtained by Court order. (R. 298.) It was not put in evidence. There was no opportunity to do so. It appears as an exhibit to the O'Connor deposition. (R. 660.)

Questions were propounded to establish:

That RFC received copies of all bank examiners' reports pursuant to this letter. (R. 669-670.)

That power to control the bank management was never exercised. (R. 676.)

That RFC failed to act between 1933 and 1938 to correct the conditions disclosed by the examiner's reports. (R. 671-672.)

September Company matter.

The recapitalization of June 1933, involved issuance of $5,000,000 in preferred stock. Standard Oil Company of

California took one-half of that issue. The balance was registered in the name of September Company—a dummy wholly owned by Mortimer and Herbert Fleishhacker. (R. 1284-1285, 1449.)

September Company received a $2,500,000 loan from RFC to purchase its share of the preferred. (R. 1449, 1691.) It realized a secret profit from the venture.

RFC funds were advanced at a five per cent rate.[43] The stockholders of the bank paid six per cent in dividends on the same capital. (R. 1284.) The secret profit amounted to $25,000 per annum. It was received by Mortimer and Herbert Fleishhacker as the owners of September Company. The arrangement continued from 1933 until 1938. The total profit was $148,040.85.[44]

There was no legal reason for this circuitous handling of funds. RFC has authority under 12 USCA 51(d) to take stock directly in its own name. Mortimer Fleishhacker represented the stockholders in the negotiation.

---

[43]Under 15 USCA 605b(b) the RFC is required to file reports with Congress. Our attention was directed to that section in briefing our case for the Circuit Court. We requested the Secretary of the Senate to search his files. He found a copy of the RFC report filed for the month of June, 1933. The relevant entry has been certified. This is contained in an exhibit lodged with the clerk of this Court on certiorari. It shows:

"September Company, $2,500,000 5%"

This report, and the entry quoted, are judicially noticed. (*Arizona v. California*, 283 U.S. 423 at 452, 453.)

[44]R. H. Holmberg, assistant secretary of the bank, testified in July, 1941, as to the amount of dividend payments made while the old preferred issue was outstanding. (R. 1285-1286.) We have taken these figures and divided to get the equivalent for the one-half held in September Company. Five percent interest on the RFC loan is calculated for the time same was outstanding. The difference represents secret profit, viz.:

September Co. dividends	$824,082.50
Interest paid to RFC	676,041.65
Secret profit	$148,040.85

He was a fiduciary. (*Pepper v. Litton*, 308 US 295.) It was his duty to get the best possible bargain for them. It was his duty to get these funds at a five per cent rate. He had no right to enter into an arrangement whereby the stockholders would have to pay six per cent.

Questions were propounded in connection with this matter. These included inquiry into conferences with Mortimer Fleishhacker resulting in granting of the loan (R. 664-666); knowledge of the Fleishhacker interest in September Company (R. 666-667); and identity of the persons who passed on the application under 12 USCA 51d. (R. 667-668.)

Privilege of Witnesses.

All witnesses are subject to process unless exempted by statute or by some valid regulation. Discovery rules apply to all matters "not privileged" which are "relevant to the subject matter involved" in a pending action. (Rule 26 FRCP.) We therefore consider the status of the various parties named:

Bank Officers.

Since the corporation was a party defendant, its officers and directors are subject to cross-examination. Under Federal Rules, and also under California law, they may be treated as adverse parties.[44a]

[44a]Rule 43(b) FRCP permits calling of an adverse party or officer or director of a corporation which is an adverse party according to Rules of Cross-examination. Similar provision is made by California Code of Civil Procedure, Section 2055.

RFC Officials.

The status of such parties is the same as that of the agency which they represent. This was created with power to sue and be sued. (15 USCA 604.) It is subject to the ordinary burdens of litigation. See:

Reconstruction Finance Corporation v. Menihan Corp., 312 US 81;[45]

Keifer & Keifer v. Reconstruction Finance Corporation and Regional Agricultural Credit Corp., 306 US 381;[46]

Federal Housing Administration v. Burr, 309 US 242;

Federal Land Bank v. Priddy, 295 US 229.

RFC is a majority stockholder. Its conduct has become an issue. If made a defendant, the answer would be clear. It can make no difference where this agency, though not formally joined, is in fact involved. The power to be sued carries with it the right to interrogate officers of such agency.

Comptroller and Chief Bank Examiner.

Reports of National Bank Examiners have been admitted without question in many cases.[47] If there is a

---

[45]Held liable to payment of costs of suit, in like manner as an ordinary litigant.

[46]Held that an affiliate of RFC inherited the capacity to "sue and be sued", which Congress provided for RFC as the parent corporation, and that full legal responsibility was necessarily created as against such affiliate.

[47]The Federal Reserve Act expressly recognizes the right of a Court to issue process respecting matters involved in a bank examination. 12 USCA 484 provides:

"No bank shall be subject to any visitorial powers other than such as are authorized by law, *or vested in the courts*

privilege—the bank could waive it. If that is true, stockholders defending its rights have equal standing.

Federal Deposit Insurance Corporation.

Also created with power to sue and be sued. (12 USCA 264j.) Its officers are subject to the rule governing RFC.

Federal Reserve.

The rule applicable to the Comptroller and Bank Examiners should apply. We are aware of no statute creating privilege. If there be any, petitioners as representatives of the bank, have power to waive it.

The general rule is as declared by Chief Justice Marshall in *United States v. Burr,*—

> "The court can perceive no legal objection to issuing a subpoena duces tecum to any person whatever, provided the case be such as to justify the process."

The right to maintain discovery against federal agencies has been recognized under existing Rules of Civil Procedure.[48]

---

of justice or such as shall be or shall have been exercised or directed by Congress. . . ."

Examiners' reports have been admitted in evidence in many cases. See: *Cox v. Montague*, 78 Fed. 845; *Anderson v. Akers*, 7 Fed. Supp. 924 at 939-941; *Atherton v. Anderson*, 99 Fed. (2d) 883 at 889; *Goess v. Ehret*, 85 Fed. (2d) 109; *Federal Deposit Insurance Corp. v. Mason*, 115 Fed. (2d) 548; *Werner v. Crippen*, 245 App. Div. 363, 282 N.Y. Supp. 722, 270 N.Y. 535, 200 N.E. 305; *In re Culhane*, 269 Mich. 68, 256 N.W. 807; *In re Millspaugh*, 307 Mo. 185, 270 S.W. 110; *In re French*, 315 Mo. 75, 285 S.W. 513, 47 ALR 688.

[48] *Fleming v. Bernardi*, 1 FRD 624; *Brewer v. Hassett*, 2 FRD 222; *United States v. General Motors Corporation*, 2 FRD 528; also article at 56 Harvard Law Review, 1125, "Discovery against Federal Administrative Agencies", by Pike and Fischer.

Simple Question Involved.

Petitioners are not responsible for the conditions which have made it necessary to resort to process. *There should be no difference between the right to oppose a settlement by this corporation, and the right to take such action against any other concern.*

There is a simple standard which the law applies to management. This involves the duty to act impartially and without conflict of interest. The violation of that principle has prevented negotiation of a fair settlement.

Three years ago we made a suggestion which, in the interest of stockholders, ought to have been accepted. This was evidenced by a letter sent to the president. We quote therefrom:

"Aaron M. Sargent
1115 Hobart Building
San Francisco, California
Tel.—EXbrook 1447

May 28, 1941

William H. Thomson, President,
Anglo California National Bank of S.F.,
No. 1 Sansome Street,
San Francisco, California.

Dear Sir:

Subject: Denicke v. Fleishhacker, et al
Settlement Discussions.

You have submitted to Mr. Denicke for comment a proposal that the bank accept in full discharge of liability now asserted . . . the sum of $350,000 . . . Mr. Denicke has been requested to indicate his acceptance or rejection of this proposition. . . .

We are not in possession of those facts which are necessary to an impartial consideration of this proposition. . . .

We feel a lack of confidence in the legal representation of the bank's affairs in regard to this case. This feeling extends to the matter of the adequacy of the amount proposed. Our experience in these negotiations indicates that further progress may not be expected through negotiations conducted in the same channels. . . .

We believe that the bank should consider the employment of some firm having no prior connection with any of these matters and that we should then attempt to adjust controversies in a manner which will eliminate these difficulties. . . .

We have decided to make ourselves available to any group of the defendants who desire to negotiate a settlement. If an offer is obtained in an amount which we feel justified in recommending to the court, —we will submit such figure to you and then ask for its acceptance.

If the bank should decide to retain special counsel for further negotiations in this matter, and if it should then appear that further discussions are possible, free of the conditions which have so far frustrated our efforts,—we will be willing to participate therein.

Very truly yours,
Aaron M. Sargent."
(R. 1651-1668.)

ams/em

For three years there have been secret negotiations. Petitioners were not at the conference table. Applications made to the District Court were not accompanied by that frank disclosure which the situation demanded. It has

been necessary to continue suit to obtain relief. *There has been no effort to determine how much can be collected by counsel not acting under disqualification.*

XIII.

Certiorari to Protect Right of Appeal.

There has been no trial and no review on appeal. It is clear from the action taken in the Circuit Court, that there was a total failure to exercise jurisdiction. A miscarriage of justice has resulted. The jurisdiction of this Court is based on Jud. Code 240 (28 USCA 347), which provides:

> "In any case, civil or criminal, in a Circuit Court of Appeals . . . it shall be competent for the Supreme Court of the United States . . . to require by certiorari . . . that the cause be certified . . . with like effect as if . . . brought there by unrestricted writ of error or appeal."

This jurisdiction resulted from the Act of March 3, 1891 (26 Stat. 826) creating the Circuit Courts of Appeals, and subsequent amendments. Congress assumed that the creation of an intermediate Court of Appeal would satisfy the requirement of due process and permit this Court to act under a limited jurisdiction. This is recognized by Rule 38, which provides:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. . . ."

In exercising this limited jurisdiction, there has been a definite responsibility. That subject was covered by the testimony of Justice Van Devanter before the Senate Judiciary Committee in 1935.

> "Petitions for certiorari are not determined by a majority vote. If as many as four members of the Court, which is a minority, vote for granting a petition for certiorari, it is invariably allowed. Mr. Justice Brandeis (present as a member of the Committee of the Court) has been on the Court for twenty years, and he will not recall a single instance in all that period where a petition for certiorari which commended itself to four members of the Court was not granted. That is a rule that is understood and adhered to, and it works well. The point is that in exercising that certiorari jurisdiction the Court desires to be at fault in taking jurisdiction rather than to be at fault in rejecting it. That rule is not one of recent years. It originated before almost all of the members of the Court ever thought of being there."[49]

During hearings on the Judiciary Amendments of 1925 concern was expressed over the proposal to create a discretionary right of review.

> "Senator Walsh of Montana expressed serious disagreement. He was opposed to making the Circuit Courts of Appeals final arbiters of constitutional questions. 'I find it difficult,' he said, 'to yield to the idea that the Supreme Court of the United States

[49]Hearing on Senate Bill 2176, 74th Congress, 1st Session, in 1935, pp. 9-10, cited in "Jurisdiction of the Supreme Court of the United States"—Robertson & Kirkham, p. 542.

> ought to have the right in every case to say whether their jurisdiction shall be appealed to or not.' He distrusted the principle which underlay the bill, namely, the extension of the discretionary jurisdiction of the Supreme Court. Resort to certiorari appeared to him too precarious for litigants because too capricious in its actual operation."[50]

In most certiorari matters, petitioner has had the benefit of review by a lower Court, either state or federal. His application for further review is based on the importance of the problem.

We are here to obtain a review which ought to have been granted in a Circuit Court. The due process clause of the Fifth Amendment applies to the proceedings had in that Court. That clause has been violated.

We are here to obtain a review which ought to have been granted in a Circuit Court. The due process clause of the Fifth Amendment applies to the proceedings had in that Court. That clause has been violated.

Denial of Due Process in the Circuit Court.

We took an appeal in the Ninth Circuit. Nine substantial questions were presented. None of them have been decided. It is impossible to read the petition for rehearing in bank (R. 2017) without forming that conclusion. An opinion was filed during adjournment. Two members of the Court were not willing to sign it. The Court had a membership of six. It was impossible to

---

[50] "The Business of the Supreme Court"—Frankfurter and Landis, p. 276.

obtain consideration from any judge not originally assigned. Every remedy has been exhausted. It has been impossible to obtain relief. *We have come to a forum located three thousand miles from the place of our residence, because it has been impossible to obtain a decision in any other Court.*

We apply for writ of certiorari directed to the Circuit Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
June 7, 1944.

AARON M. SARGENT,
Attorney for Petitioners.

(2)

Office - Supreme Court, U. S.
JUN 13
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1943

No. 155

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a national banking association), MORTIMER FLEISHHACKER, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, JR., GEORGE I. COCHRAN, PHILIP S. BAKER, R. D. BRIGHAM, WALTER E. BUCK, WALTER A. HAAS, PAUL E. HOOVER, WILLIAM F. HUMPHREY, SAMUEL KAHN, VICTOR KLINKER, WILLIAM B. REIS, PAUL SHOUP, LEON SLOSS, JR., LOUIS SUTTER, ALFRED B. SWINERTON, T. C. TILDEN, JOSEPH O. TOBIN, WILLARD O. WAYMAN, IRENE L. BERG, Executrix of the will of William H. Berg, Deceased, R. STANLEY DOLLAR and FRANK MOSS,
Respondents.

MOTION TO CORRECT DIMINUTION AND FOR ENLARGEMENT OF RECORD.

AARON M. SARGENT,
Hobart Building, San Francisco, California,
Attorney for Petitioners.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

In the Supreme Court
OF THE
United States

October Term, 1943

No.

Ernest H. Denicke and Mary E. Doble,
Petitioners,

vs.

The Anglo California National Bank of San Francisco (a national banking association), Mortimer Fleishhacker, Herbert Fleishhacker, Mortimer Fleishhacker, Jr., George I. Cochran, Philip S. Baker, R. D. Brigham, Walter E. Buck, Walter A. Haas, Paul E. Hoover, William F. Humphrey, Samuel Kahn, Victor Klinker, William B. Reis, Paul Shoup, Leon Sloss, Jr., Louis Sutter, Alfred B. Swinerton, T. C. Tilden, Joseph O. Tobin, Willard O. Wayman, Irene L. Berg, Executrix of the will of William H. Berg, Deceased, R. Stanley Dollar and Frank Moss,
Respondents.

MOTION TO CORRECT DIMINUTION AND FOR ENLARGEMENT OF RECORD.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Owen J. Roberts, Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson, and Wiley Rutlege, Associate Justices of the Supreme Court of the United States:

Petitioners Ernest H. Denicke and Mary E. Doble move this Court for an order directing issuance of a writ to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, to compel performance of the duties herein specified, required to complete transcript of record. Statement of reasons is included with each item.

---

1. To Forward Original Documents.

That said Clerk be required to transmit the following to the Clerk of this Court:

(a) Original typewritten Opinion bearing sole signature of Circuit Judge Healy, filed March 1, 1944 (during adjournment of Court) in Appeal No. 10,329;

(b) Original document evidencing Amendment of CCA Rule III, bearing signatures of Circuit Judges Wilbur, Garrecht, Denman, Mathews and Haney, filed with said Clerk November 30, 1936;

(c) Original printed form of "Decree" containing blank spaces filled in with typewriter, and filed without signature in said Appeal No. 10,329, on March 1, 1944—during adjournment of Court.

Reasons:

The Opinion and Amendment of CCA Rule III (items (a) and (b)) were duly designated. See R. 2070, item 8; 2074, item 8a. Clerk was required thereby to include certified photostats. He refused. The Opinion was printed without irregular signature clause on last page thereof. (R. 1996 at 2004.) The Amendment of Rule III was omitted altogether.

The Decree (item c) printed at 2004 creates a false impression. There was an unsigned document filed separately before this entry was made.

When these originals are delivered to this Court, petitioners will request that photostat copies thereof be prepared as a supplemental record.

2. **Documents Showing Suppression of Record.**

That said Clerk be required to transmit to the Clerk of this Court certified copies of the following, filed in Appeal No. 10,329:

(a) Praecipe requesting Clerk to furnish certified photostats—filed May 10, 1944;

(b) Motion to enforce right to such copies—filed May 16, 1944;

(c) Affidavit in support of such motion—filed May 16, 1944;

(d) Minute order of May 22, 1944, denying such motion;

(e) Original or certified copy of Reporter's Transcript of Argument on such motion—filed May 24, 1944.

Reasons:

The certiorari petition filed herewith, is based on denial of due process in the Circuit Court. Documents showing suppression of the record have a bearing on that matter.

3. Proof of Facts to Support Docket Entries.

That said Clerk be required to respond under oath, to the interrogatories attached hereto as Exhibit "A", and to then transmit same to the Clerk of this Court; same are propounded to develop facts required to support the following docket entries in Appeal No. 10,329:

(a) Date and circumstances surrounding presentation of Application for Reassignment in Bank;

(b) Date and description of action taken by the Court with respect to such Application.

Reasons:

After an irregular Opinion was filed in the Circuit Court on March 1, 1944, petitioners sought Reassignment in Bank to obtain consideration of such error by other members of the Court. The Transcript shows due application made for that purpose. (R. 2014, 2015.) In the Ninth Circuit, assignment is governed by Rule 4 subs. 1 and 2:

> "The calendars of the court shall be made up by the clerk under the direction of the senior circuit judge subject to the approval of the majority of the judges.
>
> The senior circuit judge after conference with the circuit judges shall designate and assign the judges who are to hear the causes placed upon the calendars of the court; such designation or assignment may be modified or set aside by a majority of the judges."

The docket contains no entry to show presentation of this application, or action of the court thereon. These facts are material to the Petition for Certiorari.

Where the Clerk fails to make an entry, the proper course is to ascertain the fact and to then require him to make a record.

4. Instruction to Make Docket Entries.

That said Clerk be required to make entries in the Docket in Appeal No. 10,329, disclosing the facts mentioned in items (a) and (b) of paragraph 3 hereof; and that upon such entries being made—said Clerk be instructed to furnish certified copies thereof to the Clerk of this Court.

Reasons:

Upon such entries being duly made, same will constitute a part of the record to be transmitted on certiorari.

DOCUMENTS PRESENTED IN SUPPORT OF MOTION.

1. Volume V of Transcript of Record, pages 1955-2077, transmitted to Clerk of this Court on Certiorari.
2. Affidavit filed herewith.

AUTHORITIES IN SUPPORT OF MOTION.

For convenience, statement of reasons has been included opposite each item. The following questions are involved:

1. Right to direct transmittal of originals.

2. Maintenance of a proceeding to establish docket entries where record is incomplete.

28 USCA 863 provides:

> "Upon the appeal of any cause in equity . . . a transcript of the record . . . shall be transmitted to the Supreme Court. Either the court below or the Supreme Court may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof."

Under Section 262 of the Judicial Code (28 USCA 377), this Court has power to issue all necessary writs:

> "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

The certiorari power given by Section 240 of the Judicial Code (28 USCA 347), contains authority to do all acts and things required to make it effective. This includes power to ascertain the truth and to compel the making of an adequate record.

Paramount authority.

This Court is a Constitutional Court with Constitutional powers. Its jurisdiction under Article III, Section 1 includes full authority over "such inferior Courts as the Congress may from time to time ordain and establish.

We seek a writ in such form as may be appropriate to accomplish the purposes expressed herein.

This Court is a Constitutional Court with Constitutional powers. It has authority to make its jurisdiction effective. We seek a writ in proper form to accomplish that purpose.

Dated, San Francisco, California,
June 7, 1944.

AARON M. SARGENT,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the foregoing motion is well founded in point of law and fact and that the same is not presented for purposes of delay.

Dated, San Francisco, California,
June 7, 1944.

AARON M. SARGENT,
Attorney for Petitioners.

EXHIBIT "A"

In the Supreme Court

OF THE

United States

October Term, 1943

No.

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK
OF SAN FRANCISCO, et al.,
Respondents.

INTERROGATORIES TO PAUL P. O'BRIEN, CLERK CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

1. You are now Clerk of the United States Circuit Court of Appeals for the Ninth Circuit?

2. In that capacity, you have possession of all files in Appeal No. 10,329, entitled "Ernest H. Denicke et al. v. The Anglo California National Bank of San Francisco et al.", do you not?

3. How long have you held the office of Clerk of said Court?

4. On March 29, 1944, you received and filed in said appeal No. 10,329, the Praecipe which appears at page 2014 of the Transcript filed in this Court; which Praecipe includes the following instruction:

> "You are requested to present the attached Application for Reassignment to the Senior Circuit Judge for action on his part in accordance with CCA Rule 4, subs. 1 and 2."

Was such application presented to said Senior Circuit Judge in accordance with such instruction?

5. If the preceding question is answered in the affirmative, give the date of presentation of such application with statement of what occurred.

6. Did you attend any session or conference of the Court involving discussion or the taking of any action with respect to such application?

7. If so, describe same, and include reference to persons present and action taken thereat.

8. Have you ever been advised as to the action taken by the Court with respect to such Application?

9. If so, give a full statement of all facts within your knowledge bearing upon this matter.

10. Do you have possession or control of any document or memorandum disclosing any action taken by the Court or by any Judge thereof, with respect to such Application for Reassignment?

11. If so, give a brief description of same and include photostatic copies thereof as a part of your answer to this question.

12. The docket entries printed at pages 2061-2062 of the Transcript forwarded to this Court contain no reference to the fact of presentation or to any action taken by the Court with respect to this Application. Give statement of reasons for failure to enter these facts in the docket.

In the Supreme Court
OF THE
United States

October Term, 1943

No.

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK
OF SAN FRANCISCO, et al.,
Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO CORRECT DIMINUTION AND FOR ENLARGEMENT OF RECORD.

UNITED STATES OF AMERICA,
State of California,
City and County of San Francisco.—ss.

AARON M. SARGENT, being first duly sworn, deposes and says:

I am the attorney for Ernest H. Denicke and Mary E. Doble, the petitioners above named; this affidavit is made on their behalf and in support of "Motion to Correct

Diminution and for Enlargement of Record". I am familiar with the documents described in such motion, now a part of the files of the Circuit Court of Appeals for the Ninth Circuit in Appeal No. 10,329.

Original Opinion (Item 1a). This is an original typewritten document containing the following signature clause at page 9 thereof:

"Affirmed.

.....

.....

William Healy,

.....

United States Circuit Judges."

That clause was omitted at page 2004 of the Transcript.

Amendment of CCA Rule III (Item 1b). This is an original document bearing the signatures of Circuit Judges Wilbur, Garrecht, Denman, Mathews and Haney, filed with the Clerk of the Circuit Court on November 30, 1936. Same was not printed in disregard of designation.

Decree filed during Adjournment (Item 1c). This is a printed form containing spaces filled in with a typewriter, filed by the Clerk of the Circuit Court, on March 1, 1944, during an adjournment. No signatures are affixed thereto. I did not discover that such document existed until receipt of the printed transcript. My attention was directed to the following entry therein at R. 2005 referring to such "Decree", viz.:

"*Filed* and entered March 1, 1944.

Paul P. O'Brien, Clerk."

I then requested leave to examine the *original* of the document so "filed". The Clerk exhibited this unsigned memorandum, made out on a printed form.

It is necessary for this Court to have that document in order to appreciate the irregularity of the entries made in the Circuit Court on March 1, 1944.

Documents showing Suppression of Record. The following documents show conduct in the Circuit Court after preparation of the Transcript to prevent petitioners from obtaining separately certified copies to be used in this Court for enlargement of record, viz.:

Praecipe (Item 2a). This is a written instruction filed with the Clerk of the Circuit Court on May 10, 1944, to obtain separately certified photostatic copies of the Opinion and Amendment of Court Rules above mentioned. It requires the clerk to prepare such copies, or to permit appellants to have such work done. The Clerk refused to comply therewith.

Motion to Obtain Copies (Item 2b). This document was filed May 16, 1944, to obtain an order requiring the Clerk to furnish copies of the documents designated. A true copy thereof is attached hereto as Exhibit 1.

Affidavit in Support of Motion (Item 2c). This was filed May 16, 1944. It shows refusal of the Clerk to furnish copies and that such action on his part was based on an ex parte order by Circuit Judges Mathews, Stephens and Healy, dated April 14, 1944. (R. 2066.)

Order Denying Motion (Item 2d). This entry was made May 22, 1944. It shows refusal of the Circuit Court to permit petitioners to obtain true certified copies of documents bearing on their rights in this case.

Reporter's Transcript of May 22, 1944 (Item 2e). This shows refusal of the Circuit Court to permit petitioners to argue a motion brought for the purpose of obtaining copies of such documents. It discloses that Circuit Judges Mathews, Stephens and Healy sat to act on such motion and that Circuit Judge Mathews made the following statement from the bench:

> "We have here a so-called motion to obtain certified photostatic copies of designated records, in the case of Denicke and Doble against The Anglo California National Bank, No. 10,329. We have examined this so-called motion. We find that it is simply a request to the Court that the Court require the clerk to do that which we have told him not to do. *We won't entertain this motion. The motion is denied.*
>
> Mr. Sargent. I ask for my constitutional right to argue the motion.
>
> Judge Mathews. Motion denied. Court will be adjourned.
>
> Mr. Sargent. I renew my request for my constitutional right to argue the motion.
>
> Judge Mathews. You have no such right as that. *The Court will be adjourned.*"

Docket Entries Concerning Application for Reassignment in Bank (Items 3, 4 and Interrogatories Exhibit "A"). The records of the Circuit Court do not disclose whether the clerk presented the application at R. 2015, or

whether he failed to present same. It is impossible to discover therefrom whether the Court acted or failed to act, or whether such application received consideration from any member of the Court. The interrogatories attached to petitioners' motion as Exhibit "A" are necessary to determine those facts. There is no other way to make that information available to this Court.

EFFORTS TO OBTAIN RELIEF BEFORE MOTION FOR ENLARGEMENT.

Petitioners have exhausted every remedy available to them in the Circuit Court. They filed designations to place material documents before this Court (R. 2070, Item 8; R. 2074, Item 8a).

Circuit Judges Mathews, Stephens and Healy made an order in petitioners' absence excluding such documents from the transcript (R. 2066).

The clerk was then requested to certify these documents separately. He refused.

A motion was filed to obtain copies thereof. Petitioners were denied the right to argue that motion. Said motion was denied. There is no further process which can be employed in the Circuit Court. It is necessary to apply to this Court for issuance of a writ in the exercise of its appellate jurisdiction.

AARON M. SARGENT.

Subscribed and sworn to before me this 7th day of June, 1944.

(Seal) CATHERINE E. KEITH,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires December 15, 1946.

(Exhibit Follows.)

EXHIBIT No. 1

No. 10,329

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ERNEST H. DENICKE and MARY E. DOBLE,
Appellants,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a national banking association), MORTIMER FLEISHHACKER, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, JR., GEORGE I. COCHRAN, PHILIP S. BAKER, R. D. BRIGHAM, WALTER E. BUCK, WALTER A. HAAS, PAUL E. HOOVER, WILLIAM F. HUMPHREY, SAMUEL KAHN, VICTOR KLINKER, WILLIAM B. REIS, PAUL SHOUP, LEON SLOSS, JR., LOUIS SUTTER, ALFRED B. SWINERTON, T. C. TILDEN, JOSEPH O. TOBIN, WILLARD O. WAYMAN, IRENE L. BERG, Executrix of the Will of William H. Berg, Deceased, R. STANLEY DOLLAR and FRANK Moss,
Appellees.

MOTION TO ENFORCE RIGHT TO OBTAIN CERTIFIED PHOTOSTATIC COPIES OF DESIGNATED RECORDS.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellants Ernest H. Denicke and Mary E. Doble each move this Court for an order instructing the Clerk to perform the following duties in accordance with request duly made herein, viz.:

1. To prepare and furnish a certified photostatic copy of the whole of the original typewritten opinion filed herein by Circuit Judge Healy on March 1, 1944—including signature clause with two blank signature lines at page nine thereof, also wrapper attached to such document;

2. To permit appellants to take photographic negatives of the whole of said document at the Clerk's office, while said document is in the custody of the Clerk;

3. To certify a photographic copy of said document after preparation of the same by appellants in the manner specified in Item 2 hereof;

4. To prepare and furnish a certified photostatic copy of the original document evidencing amendment of Rule III of the Rules of Practice of this Court filed by the Clerk on November 30, 1936, and bearing signatures of Circuit Judges Wilbur, Garrecht, Denman, Mathews and Haney;

5. To permit appellants to take a photographic negative of said document at the Clerk's office while said document is in the custody of the Clerk;

6. To certify a photographic copy of said document after preparation of the same by appellants in the manner specified in Item 5 hereof;

7. To advise appellants as to the amount of all fees and other costs required by the Clerk for the performance of each of the duties specified under each of the foregoing items—and to accept payment thereof upon lawful tender being made.

GROUNDS IN SUPPORT OF MOTION.

1. These documents are public records.

2. Any citizen is entitled to examine them, copy them, and have them copied and certified.

3. Appellants have additional standing by virtue of their status as parties.

4. This right of examination includes the right to take photographic copies in the clerk's office, in his presence.

5. Judicial Code Sec. 124 (28 USCA 221), requires the clerk of this Court to copy and certify any document which the clerk of the Supreme Court would furnish on request.

6. 28 USCA, Sec. 543 and the fee schedule promulgated thereunder by the Supreme Court of the United States on March 15, 1941, establishes the right to obtain the relief sought herein. The following provisions thereof determine the fees which are applicable:

"Entering any rule, or making or copying any record or other paper, for each one hundred words .....$ .20

"Every search of the records of the court and certifying the same $1.00

"Affixing a certificate and a seal to any paper.$1.00

"Copy of an opinion of the court, certified under seal, for each printed page (but not to exceed five dollars in the whole for any copy)....$1.00".

7. Judicial Code, Sec. 240 (28 USCA, 347) which grants the right to prosecute certiorari herein, secures the right to obtain separate certification of any document requested by counsel for use in connection therewith.

8. 28 USCA, Sec. 863, requires the clerk to furnish separately certified copies of any documents not included in full in his transcript to the Supreme Court on certiorari.

9. This Court is not entitled to infringe these rights. The ex parte order signed by Circuit Judges Mathews, Stephens and Healy, and filed by the clerk on April 14, 1944, does not relieve the clerk, or this Court, of the duty to furnish appellants with the items requested.

10. Said ex parte order of April 14, 1944, does not apply to the application now made.

FACTS SUPPORTING MOTION.

Request for the relief sought by this motion was duly made by a praecipe filed herein on May 10, 1944. Compliance therewith was verbally requested on May 10, 11

and 12, 1944. On the date last mentioned, said clerk refused to furnish the documents mentioned. These facts are shown by the affidavit filed herewith.

POINTS AND AUTHORITIES.

The statement of grounds sustaining this motion contains citation of the statutes and authorities relied upon.

In presenting this motion appellants will refer to the affidavit served herewith, and to their praecipe filed herein on May 10, 1944.

Dated, San Francisco,
May 15, 1944.

AARON M. SARGENT,
Attorney for Appellants.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 155

Office - Supreme Court, U.
JUL 28 1945
CHARLES ELMORE

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a national banking association), MORTIMER FLEISHHACKER, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, JR., GEORGE I. COCHRAN, PHILIP S. BAKER, R. D. BRIGHAM, WALTER E. BUCK, WALTER A. HAAS, PAUL E. HOOVER, WILLIAM F. HUMPHREY, SAMUEL KAHN, VICTOR KLINKER, WILLIAM B. REIS, PAUL SHOUP, LEON SLOSS, JR., LOUIS SUTTER, ALFRED B. SWINERTON, T. C. TILDEN, JOSEPH O. TOBIN, WILLARD O. WAYMAN, IRENE L. BERG, Executrix of the Will of William H. Berg, Deceased, R. STANLEY DOLLAR and FRANK MOSS,
Respondents.

BRIEF OF RESPONDENTS, R. STANLEY DOLLAR, MORTIMER FLEISHHACKER AND MORTIMER FLEISHHACKER, JR., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAURICE E. HARRISON,
111 Sutter Street, San Francisco 4, California,
Attorney for Respondent, R. Stanley Dollar.

THEO. J. ROCHE,
Mills Tower, San Francisco 4, California,
Attorney for Respondents, Mortimer Fleishhacker and Mortimer Fleishhacker, Jr.

BROBECK, PHLEGER & HARRISON,
111 Sutter Street, San Francisco 4, California,
Of Counsel for Respondent, R. Stanley Dollar.

SULLIVAN, ROCHE, JOHNSON & FARRAHER,
Mills Building, San Francisco 4, California,
Of Counsel for Respondents, Mortimer Fleishhacker and Mortimer Fleishhacker, Jr.

Subject Index

	Page
Introductory Statement	2
Statement of the Case	2
The Questions Presented by Petitioners	7
I. In a minority stockholder's derivative suit the court has power, after hearing, to approve a compromise made by the corporation even though the nominal plaintiff objects thereto	8
II. Petitioners had a full hearing in opposition to the compromise	11
III. There was no violation of Federal Rule of Civil Procedure 52 with respect to findings	14
IV. There is no merit in the claim that the judgment of the Circuit Court of Appeals is invalidated for failure to sign the opinion	15

Table of Authorities Cited

Cases	Page
Fratessa v. Superior Court, 125 Cal. App. 372	10
Hazeltine Corporation v. General Motors Corporation (C.C.A. 3rd, 1942), 141 F. (2d) 34	15
In re New England Company, 9 Fed. (2d) 344	11
Loeb v. Berman, 217 Cal. 716	10
Russell v. Weyand, 5 Cal. App. (2d) 259	10
Seaman v. McCulloch, 8 Fed. (2d) 820	11
Spellacy v. Superior Court, 23 Cal. App. (2d) 142	10
Whitten v. Dabney, 171 Cal. 620	10

Rules	
Federal Rules of Civil Procedure:	
Rule 23(c)	10
Rule 52	14
Rule 52(a)	8

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 155

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a national banking association), MORTIMER FLEISHHACKER, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, JR., GEORGE I. COCHRAN, PHILIP S. BAKER, R. D. BRIGHAM, WALTER E. BUCK, WALTER A. HAAS, PAUL E. HOOVER, WILLIAM F. HUMPHREY, SAMUEL KAHN, VICTOR KLINKER, WILLIAM B. REIS, PAUL SHOUP, LEON SLOSS, JR., LOUIS SUTTER, ALFRED B. SWINERTON, T. C. TILDEN, JOSEPH O. TOBIN, WILLARD O. WAYMAN, IRENE L. BERG, Executrix of the Will of William H. Berg, Deceased, R. STANLEY DOLLAR and FRANK MOSS,
Respondents.

BRIEF OF RESPONDENTS, R. STANLEY DOLLAR, MORTIMER FLEISHHACKER AND MORTIMER FLEISHHACKER, JR., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

INTRODUCTORY STATEMENT.

The respondents on whose behalf this brief is filed do not concede that they were properly named as appellees in the Circuit Court or as respondents herein. The real parties in interest are the petitioners on the one hand and respondent, The Anglo California National Bank of San Francisco, on the other. This brief is presented in the hope that it will aid the Court in understanding the questions involved in this petition.

STATEMENT OF THE CASE.

The statement contained in the petition for writ of certiorari and in the brief in support thereof is confusing and to some extent inaccurate. The controlling facts are stated in an opinion of the Circuit Court (141 F. (2d) 285; R. 1996-2004). We restate them now with some amplification and with appropriate reference to the record.

This is a minority stockholder's derivative suit brought on November 7, 1938, for the purpose of enforcing alleged claims in favor of The Anglo California National Bank of San Francisco (hereinafter referred to as the bank) against certain directors of the corporation.* The term "defendants" will be for convenience hereinafter used as referring to these individuals against whom liability is asserted (although the bank is joined as a nominal defendant). The minority stockholder, who commenced the suit, will be hereinafter referred to as the plaintiff. He

*Other defendants were joined, as to whom plaintiff applied for leave to dismiss on June 15, 1942 (R. 442).

was the owner of but 6.08 hundredths of 1% of the outstanding shares of the bank.

On July 1, 1941, the bank filed a petition for termination of the suit and approval of an offer of compromise under which the defendants were to pay it the sum of $350,000 in settlement of the claims involved in this suit and also of the claims involved in another suit pending in the District Court, as well as certain other claims against the defendants (R. 239). Objections to this petition were filed by plaintiff (R. 262) and by Mary E. Doble, another stockholder and the other appellant herein (R. 282). Lengthy hearings upon the petition were held before Judge St. Sure and Judge Roche (R. 989-1844). On January 27, 1942, an order was made denying the petition, without prejudice to the filing by said bank, if so advised, of separate offers of compromise in each of the actions (R. 288-289). On March 19, 1942, the bank filed a second petition for termination* alleging that an offer had been made to terminate the action by payment to the bank of the sum of $200,000 and that the bank had determined that such offer should be accepted. The offer thus reported (as distinguished from the earlier one reported on July 1, 1941) had no reference to any litigation or claims except those involved in this suit. The petition prayed that after notice to the stockholders of the bank a hearing be had and that the bank be authorized to accept the offer and dismiss the action with prejudice (R. 314-326). An order was thereupon made setting the petition for hearing and directing that notice be given to the stockholders (R. 329-330). In response to this notice plaintiff filed objections to the petition on

*Referred to herein as "the petitioner".

March 26, 1942 (R. 332-339). Objections to the petition were also filed on March 28, 1942, by appellant Mary E. Doble (R. 340-344).

The petition came on regularly for hearing before the District Court on March 31, 1942, Mr. Aaron M. Sargent, attorney for plaintiff, appearing in opposition to the petition. By stipulation paragraphs I to V, inclusive, of the petition were admitted (R. 1845).* It was further stipulated that all of the record on the earlier petition, including the proceedings thereunder and the testimony taken in connection therewith, should be considered as being in evidence for the purpose of the second petition (R. 1846). The Court then proceeded to hear testimony, Mr. Sargent participating in the proceedings on behalf of plaintiff and his co-petitioner herein. At the close of the testimony, Mr. Sargent requested that the proof taken on the petition be considered a part of the trial of the case in the event the petition was denied. Thereupon the following proceedings took place:

> "Mr. Sargent. I would ask for an order of consolidation, so that the proof will be considered a part of the trial and part of the settlement of the petition at the same time. There is certainly no need of doing the job twice.
>
> The Court. I do not think the hearing you have had on the offer of compromise, the testimony of that hearing should be considered part of the trial.
>
> Mr. Sargent. Not at this time, but we have here a matter which is for adjudication.
>
> The Court. How do you mean, after this matter now before the Court?

*With the exception of a legal conclusion in Paragraph I.

Mr. Sargent. No, I am moving at this time in the nature of a nonsuit for your Honor to deny the petition, and I wish to reserve the right to introduce evidence in rebuttal at a later date.

The Court. I do not want to hear any further evidence on it. I would prefer to have it understood that it is being submitted on the evidence adduced. I do not want to hear additional evidence on this offer.

Mr. Sargent. In that case, I will submit the matter on the showing made, and on the arguments I have made, and on the briefs already on file.

The Court. That is what I understood was to be done.

Mr. Williams. That is satisfactory to us." (R. 1887-1888.)

After further discussion between Mr. Williams, counsel for the bank, and the Court, the following proceedings took place:

"Mr. Williams. We are willing to submit the matter upon the record now before the Court.

The Court. I suppose that would include the briefs filed.

Mr. Williams. Yes, and any argument which we have made.

Mr. Sargent. I have only one other statement to make, as between me and the bank and its representatives there has been no discussion of any character as to compensation, personally to me or my client, a total lack of discussion and agreement. I give that on my word as an attorney practicing in the Federal Court.

The Court. You mean since the last hearing?

Mr. Sargent. There has never at any time been any discussion. I am content to accept, when this case is decided, such allowance as is proper on the merits of the case, and the damage cases referred to in the

last hearing which are being prosecuted separately. That statement I have already given upon the record.

We submit it.

The Court. Very well, I will continue this matter until the 21st of April." (R. 1889-1890.)

It is quite clear from the foregoing that both counsel and the Court considered that the testimony had been closed and the petition submitted for decision.

On June 29, 1942, the District Court handed down an opinion discussing the facts at length and granting the petition (R. 440-457). On July 2, 1942, a judgment was signed and filed authorizing the acceptance of the offer of compromise and the dismissal of the action on payment of the sum of $200,000 (R. 457-461). On the same day, July 2, 1942, a dismissal with prejudice was filed by the bank's attorney (R. 461-462) and an order was made by the Court reciting the payment of the money and the filing of the dismissal and adjudging that the action was dismissed with prejudice (R. 462-463).

After the entry of judgment plaintiff filed motions to vacate the judgments and orders of June 29, 1942 and July 2, 1942 (R. 468), for leave to file a third amended complaint (R. 532), to cross-examine certain witnesses (R. 573) and to take depositions (R. 580). These motions came on for hearing on August 17, 1942 and were on that day denied. The Court also granted the motions of certain defendants to quash the proceedings to take certain proposed depositions (R. 737-739).

The appeal to the Circuit Court of Appeals was taken from the orders of June 29, 1942 and July 2, 1942, authorizing the compromise, granting the petition for termination

of the action and dismissing the action with prejudice, and also from the order of August 17, 1942, denying the motion to vacate judgment and for other relief, and granting the motions to quash (R. 746-747).

On March 1, 1944, the opinion of the Circuit Court of Appeals affirming the orders was filed (R. 1996-2004) and an order was entered that a decree be filed and recorded in the Minutes of the Court in accordance with the opinion (R. 1995-1996).

Thereafter petitioners moved to vacate the judgment of the Circuit Court of Appeals on the ground that the opinion filed had not been signed by two of the three judges before whom the appeal was heard (R. 2005-2010). This motion came on for hearing on April 3, 1944, before Circuit Judge Mathews and Circuit Judge Healy, at which time Judge Mathews announced that "the opinion was unanimous. The clerk's action was in accordance with the direction of the Court, all three of the judges being in accord, and his action is still in accord with the court's view" (R. 2058), and the motion for an order vacating the judgment was denied (R. 2060).

Petitioners filed in the Circuit Court a petition for a rehearing by the Court in bank (R. 2017-2056) which was denied on April 7, 1944 (R. 2061).

THE QUESTIONS PRESENTED BY PETITIONERS.

In spite of the prolixity of the petition, it is somewhat difficult to define the precise points upon which petitioners rely. So far as we can ascertain they are all comprised within the following questions:

1. Has a District Court the power, in a minority stockholder's derivative suit, after hearing all objections, to approve a compromise of the controversy between a corporation and the persons against whom the claim is asserted, even though the nominal plaintiff opposes the compromise? This is a pure question of law.

2. In this case did the nominal plaintiff have an opportunity to be heard in opposition to the compromise and to offer evidence in support of his objections thereto? This is a pure question of fact.

3. Should the judgment of the District Court be reversed on the ground that it violated Rule 52(a) of the Rules of Civil Procedure by failing to make findings?

4. Is the judgment of the Circuit Court of Appeals invalidated because the opinion was not signed by a majority of the Circuit Judges participating?

I. IN A MINORITY STOCKHOLDER'S DERIVATIVE SUIT THE COURT HAS POWER, AFTER HEARING, TO APPROVE A COMPROMISE MADE BY THE CORPORATION EVEN THOUGH THE NOMINAL PLAINTIFF OBJECTS THERETO.

The petition asserts the claim that "a stockholder with status to sue, has, as a corollary, the right to manage and control the litigation. He has the right to prevent a dismissal" (Petition, p. 12). Petitioners thus apparently take the position that the mere accidental circumstance that the plaintiff, as a minority stockholder, has brought this derivative suit, precludes the Court from considering and approving a compromise of the claim as between the corporation on whose behalf he sues and the persons against

whom the claim is asserted. In other words, petitioners say that the plaintiff can act as a dog in the manger and, at his whim or caprice, block a settlement which the Court, after full hearing, concludes to be in the interest of the corporation.

No better illustration could be found of the opportunities given a minority stockholder to act as a "dog in the manger" by the rule contended for than is disclosed by the record in the present case. It appears that while the bank had under discussion with Mr. Sargent, plaintiff's attorney, a suggestion that a payment of $500,000 (R. 1088) be made to compromise this suit and another minority stockholder's suit, Mr. Sargent on January 23, 1941 wrote a letter to the president of the bank demanding fees and expenses in the sum of $210,000 out of the total anticipated recovery of not more than $500,000 and suggested that his demand for these enormous fees be concealed from the Court (R. 1089-1099; see comment in trial Court's opinion at R. 454-456).* It is not surprising that the trial judge in his opinion stated that "the actions of Mr. Sargent in relation to a settlement of the litigation and the securing for himself of attorney's fees and expenses were without the knowledge and sanction of the Court" (R. 456).

The claim that a minority stockholder who happens to be a nominal plaintiff suing for the corporation can pre-

*Later on May 21, 1941, Mr. Sargent had under discussion an offer to pay $400,000 to settle not only the two minority stockholders' suits but also a personal claim of Denicke which later became the subject of a suit by him dismissed for lack of jurisdiction and now on appeal (No. 10,347 in this Court). In this discussion Mr. Sargent agreed to the proposed settlement "provided that his fees were properly taken care of" and added that his statement could not be used in any Court proceeding (R. 1171).

vent the Court from considering and approving a compromise is not only shocking to elementary principles of justice, but it is opposed to well-established principles governing derivative suits.

Whitten v. Dabney, 171 Cal. 620.

Because the nominal plaintiff in a derivative suit occupies the position thus described, it is universally held that he cannot dismiss the suit, nor enter into a compromise with the actual defendants, unless the approval of the Court is obtained.

Spellacy v. Superior Court, 23 Cal. App. (2d) 142.

And where, after the filing of a derivative suit by a minority stockholder, the corporation (which although nominally a defendant is the real plaintiff) appears, the Court has power to approve a compromise of the claim without the assent of the original plaintiff.

Fratessa v. Superior Court, 125 Cal. App. 372;

Loeb v. Berman, 217 Cal. 716.

It has even been held that where the Court, after hearing, approves a compromise, the nominal plaintiff has no right to appeal from the order approving the compromise, because his personal interests are not affected.

Russell v. Weyand, 5 Cal. App. (2d) 259.

The control of the Court over any dismissal or compromise of a derivative suit is recognized by Rule 23(c) of the Federal Rules of Civil Procedure, declaring that "a class action shall not be dismissed or compromised without the approval of the Court" and providing for a notice to members of the class.

And the federal decisions recognize the inherent power of the Court to control and approve or disapprove any compromise of claims sought to be made.

Seaman v. McCulloch, 8 Fed. (2d) 820;
In re New England Company, 9 Fed. (2d) 344.

The reasoning and controlling effect of these authorities, so we submit, is unanswerable. The District Court in the present instance had full power to approve or disapprove the proposed compromise. Plaintiff could not, by interposing his individual veto, deprive the Court of this inherent power.

None of the authorities cited in the petitioners' brief sustain their position. It is submitted that on this point the decision of the Circuit Court of Appeals is unassailable.

II. PETITIONERS HAD A FULL HEARING IN OPPOSITION TO THE COMPROMISE.

The claim is scattered through the petition for certiorari and the brief in support thereof that the order of the District Court approving the compromise was made before the hearing had been concluded and that the petitioners were deprived of the opportunity to be heard on the petition. The claim is so fantastic and over-technical, in view of the record of what occurred, that it is best disposed of by a few references to the transcript itself. We have already pointed out that, after due notice to all the stockholders, a hearing was held on March 31, 1942, at which Mr. Sargent appeared on behalf of plaintiff and, after admitting certain allegations of the petition (R. 1845,

1846), stipulated that all of the testimony taken on the earlier petition should be considered in evidence (R. 1846) and participated in the taking of supplementary evidence with respect to the second petition (R. 1846-1882). Mr. Sargent thereupon argued in opposition to the petition (R. 1883-1887). He requested that the proof taken on the hearing be considered upon the trial, which motion was denied by the Court (R. 1887). He then stated that he was "moving * * * in the nature of a nonsuit * * * to deny the petition" and that he wished "to reserve the right to introduce evidence in rebuttal at a later date", to which the Court replied that it did not wish to hear any further evidence but would prefer to have it submitted on the evidence adduced. Mr. Sargent thereupon stated:

> "In that case, I will submit the matter on the showing made, and on the arguments I have made, and on the briefs already on file"

to which the Court replied:

> "That is what I understood was to be done."

And counsel for the bank thereupon stated:

> "That is satisfactory to us." (R. 1888.)

Counsel for the bank stated his willingness to submit the matter on the record including briefs filed and arguments made (R. 1890) and Mr. Sargent concluded by saying:

> "We submit it." (R. 1890.)

It is quite apparent from all the discussion of the parties that what was being submitted was not merely Mr. Sargent's motion to deny the petition, but the petition itself. The fact that for the Court's convenience the case

was carried on the calendar from time to time is utterly immaterial.

The plain fact is that plaintiff and his copetitioner for certiorari were given the most ample opportunity to adduce any evidence which they had in opposition to the petition. The earlier petition, filed July 1, 1941, had been opposed by the same attorney for the same clients. The circumstances affecting the exercise of the Court's discretion were inquired into at great length before the two district judges. The testimony taken on this earlier hearing, pro and con, occupies almost 1000 pages of the present record. On this hearing the attorney for the objecting parties was given the opportunity to cross-examine the witnesses and introduce such testimony as he desired. He took full advantage of this opportunity. Thereafter the attorney for the objecting parties argued and briefed the merits of the first petition at length. The second petition (the one which was granted) came before one of the judges who had presided at the hearing on the first petition. He had, of course, heard all of the evidence and considered all the arguments made at the earlier hearing. Needless repetition of this testimony was avoided by a stipulation of the parties that it might be deemed to be adduced on the second hearing. The questions involved were the same, except as to the amount of the offer and the fact that the second petition involved a settlement of only a part of the claim covered by the earlier offer. In view of this situation and the full opportunity given counsel for appellants to participate in the supplementary oral hearing of the second petition, it passes belief how it can be seriously contended that there was not full opportunity for a hear-

ing on the objections. The opinion of the trial judge shows that consideration was given to all of the objections urged (R. 440-457). If ever objecting parties were given the utmost latitude in presenting evidence and argument in support of their objections, these petitioners for certiorari were.

The Circuit Court of Appeals, after reviewing the proceedings properly concluded that "we see in all this no sufficient reason for believing that appellants were deprived of their day in Court".

III. THERE WAS NO VIOLATION OF FEDERAL RULE OF CIVIL PROCEDURE 52 WITH RESPECT TO FINDINGS.

The claim that Rule 52 was violated by failure to make findings of fact is wholly without merit. In the first place, Rule 52 applies only to a judgment entered after trial, and does not by its terms apply to a hearing on a petition such as the one here involved. But, entirely aside from this point, and assuming that Rule 52 does apply here, it was fully complied with. The Court specifically found in its judgment that "all of said objections are without merit" and that "it is for the best interests of the defendant Anglo Bank and its shareholders that the above-entitled action be dismissed with prejudice upon said Anglo Bank's receiving the sum of $200,000 in lawful money of the United States" (R. 459, 460). These were the only issues presented to the Court upon the hearing. But over and above these findings the District Court delivered an opinion (R. 440-457) in which it reviewed all of the facts in detail and passed upon every controverted question of fact

which had been presented to it. Counsel for appellants does not point to a single issue which is not disposed of in this opinion; and it would be impossible for him to do so.

If the opinion of the trial Court disposes of the controlling issues of fact, it is wholly immaterial that the Court's views are not also expressed in a paper which is specifically labeled as being "Findings of Fact". In *Hazeltine Corporation v. General Motors Corporation* (C.C.A. 3rd, 1942), 141 F. (2d) 34, the Court said:

> " 'The failure of the trial judge to comply literally with the provisions of Rule 52a, although it has been characterized as a "dereliction of duty," is not always a ground for reversal and remand with instructions to make specific findings as required by the Rule. The latter course of action has been adopted where there was an inadequate statement of facts upon vital issues and where such factual issues were not resolved. If, however, the opinion of the trial judge afforded a "clear understanding of the basis of the decision below" and resolved the major factual disputes, the mere formal requirement of separation of findings of fact and conclusions of law has been held not sufficient to necessitate a reversal.' "

IV. THERE IS NO MERIT IN THE CLAIM THAT THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS IS INVALIDATED FOR FAILURE TO SIGN THE OPINION.

Much space is devoted in the petition for certiorari and the supporting brief to the objection that the opinion which was filed in the Circuit Court of Appeals on March 1, 1944, carried the signature of only one of the three

judges who heard the case. The record shows that on this day the clerk entered an order that a decree be filed and recorded in the minutes of the Court in accordance with the opinion in question (R. 1995-1996). Apparently the point relied upon is that there was a failure to conform to Rule III of the Circuit Court of Appeals with respect to the machinery for informing the clerk of the Court's decision. This point is so obviously tenuous and technical as to deserve little discussion. It would seem clear that the Court should be and was free to adopt any appropriate method of informing its ministerial officer of a decision reached. But this point need not be labored, because the record shows that, on April 3, 1944, upon the hearing of the motion to vacate the judgment, while the Court was in session with two of the judges (Judge Mathews and Judge Healy) present who had participated in the previous hearing, the Court announced that the "clerk's action was in accordance with the direction of the Court, all three of the judges being in accord, and his action is still in accord with the Court's view" (R. 2058). If there had been any irregularity or informality about the previous action of the Court (which we deny), this announcement constituted in itself an act of the Court ratifying the ministerial act of the clerk, and operated as an affirmance of the orders appealed from. The case of petitioners is indeed a poor one when reliance must be placed on a point such as this.

It is respectfully submitted that the petition for certiorari should be denied.

Dated, San Francisco, California,
July 24, 1944.

MAURICE E. HARRISON,
Attorney for Respondent,
R. Stanley Dollar.
THEO. J. ROCHE,
Attorney for Respondents,
Mortimer Fleishhacker and Mortimer Fleishhacker, Jr.

BROBECK, PHLEGER & HARRISON,
Of Counsel for Respondent,
R. Stanley Dollar.
SULLIVAN, ROCHE, JOHNSON & FARRAHER,
Of Counsel for Respondents,
Mortimer Fleishhacker and
Mortimer Fleishhacker, Jr.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

Office - Supreme Court, U.S.
FILED
JUL 22 1944
CHARLES ELMORE CROPLEY
CLERK

No. 155

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a national banking association), MORTIMER FLEISHHACKER, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, JR., GEORGE I. COCHRAN, PHILIP S. BAKER, R. D. BRIGHAM, WALTER E. BUCK, WALTER A. HAAS, PAUL E. HOOVER, WILLIAM F. HUMPHREY, SAMUEL KAHN, VICTOR KLINKER, WILLIAM B. REIS, PAUL SHOUP, LEON SLOSS, JR., LOUIS SUTTER, ALFRED B. SWINERTON, T. C. TILDEN, JOSEPH O. TOBIN, WILLARD O. WAYMAN, IRENE L. BERG, Executrix of the Will of William H. Berg, Deceased, R. STANLEY DOLLAR and FRANK MOSS,
Respondents.

BRIEF FOR RESPONDENT, THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a National Banking Association).

ALLEN L. CHICKERING,
WALTER C. FOX, JR.,
VINCENT I. COMPAGNO,
111 Sutter Street, San Francisco 4, California,
Attorneys for Respondent.

CHICKERING & GREGORY,
111 Sutter Street, San Francisco 4, California,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

		Page
I.	Opinions below	2
II.	Statement of basis of jurisdiction	2
III.	Corrected statement of the case	2
IV.	Argument	3
	(1) Claim that United States Circuit Court of Appeals has refused to review the record before, and the decision of, the United States District Court	4
	(2) Claim as to special findings	6
	(3) Claim that petitioners were not given an opportunity to present evidence	7
	(4) Claim of right to rehearing en banc	9
	(5) Claim that District Court had no power to approve a compromise and dismissal of the action	9
	(6) Claim of right to cross-examine bank officials	11
	(7) Claim of petitioners of right to take depositions of high officials in Washington, D. C., after entry of judgment dismissing the action	12
	(8) Claim of right, after entry of judgment, to file third amended complaint and to intervene	12

Appendix.

Table of Authorities Cited

Cases

	Pages
Cohen v. Young, 127 Fed. (2d) 721, 135 Fed. (2d) 625	11, 13
Cutter v. Arlington Casket Co., 151 N. E. (Mass. 1926) 167	10
Denicke v. Anglo Bank, 141 Fed. (2d) 285, 45 Fed. Supp. 524, 26 Fed. Supp. 240	2
Dubiske v. U. S., 98 Fed. (2d) (1938) 361	7
Eggers v. National Radio Co., 208 Cal. 308, 281 Pac. 58	11
Erie RR Co. v. Tompkins, 304 U. S. 64	11
F. & C. Co. of New York v. Allen, 84 Fed. (2d) (1936) 53	7
Gallagher v. Pacific American, 97 Fed. (2d) (1931) 193, 9th Circuit	12
Goodwin v. Castleton, 144 Pac. (2d) (Wash.) 725	10
Hazeltine Corporation v. General Motors Corporation, 131 Fed. (2d) (1942) 34	7
Hyland v. Miller's Nat'l Insurance Co., 92 Fed. (2d) (1937) 462	7
Karasick v. Pacific Eastern Corporation, 180 Atl. (Del. 1935) 604	10
Klimkiewicz v. Westminster Deposit & Trust Co., 122 Fed. (2d) 957 (1941) 958	7
Klopstock v. Superior Court, 17 Cal. (2d) 13, 108 Pac. (2d) 906, 135 A. L. R. 318	11
Loeb v. Berman, 217 Cal. 716, 20 Pac. (2d) 685	10
Russell v. Weyand, 5 Cal. App. (2d) 259, 42 Pac. (2d) 381	10
Sonken-Galamba Corp. v. A. T. & S. F. Ry. Co., 34 Fed. Supp. (1940) 15	7
Whitten v. Dabney, 171 Cal. 621, 154 Pac. 312	9, 11

Statutes

Judicial Code:	
Section 24 (USCA Title 28, Section 41)	2
Section 128(a) (USCA Title 28, Section 225(a))	2

Pages

Section 240(a) (USCA Title 28, Section 347(a)) 2

Banks and Banking:
Section 84 (USCA Title 12) ..... App. iii

Other Authorities

Federal Rules of Civil Procedure:
Section 23 12
Section 23(c) ..... 3, 11, App. vi
Section 31 12
Section 52(a) 3
Section 52(b) 6
Section 75(c) ..... App. xi
Section 75(h) ..... App. xii

Rules of Circuit Court of Appeals:
Rule 3, subdivision 5 of "Terms and Sessions of Court" 4

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 155

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a national banking association), MORTIMER FLEISHHACKER, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, JR., GEORGE I. COCHRAN, PHILIP S. BAKER, R. D. BRIGHAM, WALTER E. BUCK, WALTER A. HAAS, PAUL E. HOOVER, WILLIAM F. HUMPHREY, SAMUEL KAHN, VICTOR KLINKER, WILLIAM B. REIS, PAUL SHOUP, LEON SLOSS, JR., LOUIS SUTTER, ALFRED B. SWINERTON, T. C. TILDEN, JOSEPH O. TOBIN, WILLARD O. WAYMAN, IRENE L. BERG, Executrix of the Will of William H. Berg, Deceased, R. STANLEY DOLLAR and FRANK MOSS,
Respondents.

BRIEF FOR RESPONDENT,
THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO
(a National Banking Association).

I.

OPINIONS BELOW.

The Opinion of the Circuit Court of Appeals for the Ninth Circuit is reported in 141 Fed. (2d) at page 285, and appears also in the Record at pages 1996-2004. References herein to particular portions of such Opinion are to the Record. The Opinion of the District Court is reported in 45 Fed. Supp. at page 524, and 26 Fed. Supp. at page 240, and appears in the Record at pages 440-457.

II.

STATEMENT OF BASIS OF JURISDICTION.

Petitioners invoke the jurisdiction of this Court under section 240(a) of the Judicial Code, USCA Title 28, section 347(a). Petitioner Ernest H. Denicke invoked the jurisdiction of the District Court under section 24 of the Judicial Code, USCA Title 28, section 41. Petitioners invoked the jurisdiction of the Circuit Court of Appeals of the Ninth Circuit under section 128(a) of the Judicial Code, USCA Title 28, section 225(a).

III.

CORRECTED STATEMENT OF THE CASE.

The petitioners' statement of the case is confused and incorrect. A fair and concise statement of the case appears in the opinion of the United States Circuit Court of Appeals (R1996-2002). Accordingly we adopt the Court's

statement and refer this Court to said opinion for a statement of the facts. For the convenience of the Court, we have incorporated in the Appendix hereto, a complete, but rather lengthy, statement of the facts.

IV.

ARGUMENT.

Petitioners, in effect, ask for certiorari upon eight grounds, to-wit:

(1) The claim that the United States Circuit Court of Appeals refused to review the record before, and the decision of, the United States District Court;

(2) The claim that said Court did not conform to the decisions of this Court requiring special findings, under rule 52(a) FRCP;

(3) The claim that petitioners were not given an opportunity to present evidence;

(4) The claim that petitioners were entitled to a hearing *en banc*, as a matter of right;

(5) The claim that the District Court had no power to approve a compromise and dismissal of a deriative action under rule 23(c) FRCP;

(6) The claim that the petitioners were arbitrarily denied the right of cross-examination, after dismissal;

(7) The claim that the petitioners were arbitrarily denied the right to take depositions, after dismissal; and

(8) The claim that petitioners were arbitrarily denied the right to amend their second amended complaint and intervene, after dismissal.

---

(1) CLAIM THAT THE UNITED STATES CIRCUIT COURT OF APPEALS HAS REFUSED TO REVIEW THE RECORD BEFORE, AND THE DECISION OF, THE UNITED STATES DISTRICT COURT.

This claim, like most of the claims made by petitioners, is almost too absurd to warrant a reply. After the decision in the District Court, an appeal was taken to the United States Circuit Court of Appeals by the petitioners (R746). The record was docketed, and a motion made by petitioners to enlarge the record in the Circuit Court of Appeals (R1892). Said motion was granted (R1953). Written briefs were filed and oral argument was had before three judges of the United States Circuit Court of Appeals on February 15, 1944 (R1994). Petitioners were represented by Aaron M. Sargent. The appeal was submitted to the Court for decision (R1994). The opinion of the Court was filed with its clerk on March 1, 1944 (R2004). The decree was entered upon the same day (R2005).

Petitioners contend that no valid opinion was ever rendered by the United States Circuit Court of Appeals. The basis of this contention seems to rest upon a claim that the Circuit Court of Appeals has failed to comply with subdivision 5 of its Rule 3 dealing with "Terms and Sessions of Court". Petitioners contend there was noncompliance by asserting that a copy of the written opinion filed with the clerk of the Court was not signed by each member of

the Court hearing the oral argument. Regardless of whether the assertion be true or not, the rule does not require that each or any of the three judges hearing the appeal sign a written opinion. It merely provides that an appeal is decided when (1) announced from the bench, when (2) signed opinions are filed with the clerk, or (3) when documents evidencing the decision of the Court are filed with the clerk.

The record shows that the Honorable Clifton Mathews, Circuit Court Judge, advised petitioners' counsel from the bench, in open Court, that "the opinion (on file with the clerk (R1996-2004)) was unanimous" (R2058). Counsel was also advised in open Court that the action of the Court's clerk in filing said opinion and entering the decree "was in accordance with the direction of the Court, all three of the judges being in accord" (R2058). All of said matters have been certified to this Court over the hand and seal of the Clerk of the United States Circuit Court (R2078).

There can be no question but that the petitioners are not and never have been in doubt as to the fact that the appeal has been decided, or that the opinion in the record is the unanimous opinion of the judges to whom said case was assigned and submitted for decision. The petitioners have requested a rehearing (R2017). Of what? Of that very decision. They have requested a reassignment of the case for hearing *en banc* (R2015). Why? Because it had been decided. They have requested a stay of mandate (R2062-2066). They have requested a transmittal of that very opinion to the clerk of the above-entitled Court

(R2070). Counsel for petitioners is laboring under no misapprehension as to what the decision of the Court was, what judges concurred, or what their opinion was. Counsel is merely endeavoring to create an atmosphere of irregularity in the record in the hope of bolstering his clients' cause.

Furthermore, the foregoing rule of the Circuit Court is for the guidance and protection of the Court's clerk and not of interest to the petitioners (R2058).

---

(2) CLAIM AS TO SPECIAL FINDINGS.

Special Findings, under rule 52(b) FRCP, were not required as the proceeding below was not a trial of the case upon the facts without a jury, but a hearing upon the question of whether or not a compromise and dismissal of the action was in the best interests of the Anglo Bank, the party for whom the suit was brought and, indirectly, all of its shareholders.

On the other hand, the District Court did make special Findings of Fact. The Judgment (R459) contains the following special findings: "'Finds that all the allegations contained in paragraphs I to IX, inclusive, of said petition to terminate, filed under date of March 19, 1942, are true and correct; that said defendant Anglo Bank and its representatives in filing said petition have acted in good faith and for the best interests of said Anglo Bank and its shareholders; that due notice was given to the shareholders of said Anglo Bank of the filing of said petition to terminate

and the determination of the Bank's representatives in connection therewith and of the time and place fixed for the hearing of said petition; that the only objections filed to said petition were those of the plaintiff, Ernest H. Denicke, and Mary E. Doble, a shareholder, both being represented by the attorney for the plaintiff; that all of said objections are without merit; that it is for the best interests of the defendant Anglo Bank and its shareholders that the above-entitled action be dismissed with prejudice upon the said Anglo Bank receiving the sum of $200,000 in lawful money of the United States."

The above Findings are all that was necessary to support the Court's approval of a dismissal of the action with prejudice (*Hazeltine Corporation v. General Motors Corporation,* 131 Fed. (2d) 34 (1942); *Sonken-Galamba Corporation v. A. T. & S. F. Ry. Co.,* 34 Fed. Supp. 15 (1940), at page 16; *Klimkiewicz v. Westminster Deposit & Trust Co.,* 122 Fed. (2d) 957 (1941), at page 958; *Dubiske v. U. S.,* 98 Fed. (2d) 361 (1938), at page 364); such Findings may be contained in the decree (*Hyland v. Miller's National Insurance Co.,* 92 Fed. (2d) 462 (1937), at page 464; *F & C Co. of New York v. Allen,* 84 Fed. (2d) 53 (1936), at page 54).

---

(3) CLAIM THAT PETITIONERS WERE NOT GIVEN AN OPPORTUNITY TO PRESENT EVIDENCE.

There were six days of trial in open court in July, 1941, in a joint hearing on this action (R989-1844). Twelve witnesses were sworn and testified, thirty exhibits were

offered by the petitioner Denicke and received, and thirteen exhibits were offered by the Anglo Bank and received. The Anglo Bank's president, Mr. William H. Thomson (R1031) and its first vice-president, Mr. Allard A. Calkins (R1769) testified and were cross-examined by petitioners, along with other bank officials. Written briefs were filed (R1844). A hearing in open court was had on March 31, 1942 (R1845). Two bank officials testified and were cross-examined by these petitioners (R1856, 1849). Additional exhibits were offered by petitioners and received (R1857, 63, 65, 70). Previous to said latter hearing, there were two days of pre-trial hearing before the District Court (R968, 971). Ten depositions were taken by petitioners (Rxii), during the three and one-half years the case had been pending. About every form of discovery available to a litigant was made use of by the petitioners (R925, 983). Petitioners and their counsel participated in all of the foregoing. It is not comprehendible how petitioners can contend that they were not given an opportunity to offer evidence.

Not only is the foregoing true, but counsel for the petitioners at the close of the hearing on March 31, 1942, advised the Court that in his judgment *the evidence already in* was "sufficient to justify an order that the petition be denied" (R1883), that he would "submit the matter on the showing made and on the arguments I have (he had) made and on the briefs already on file" (R1888). There can be no question but that counsel for the petitioners voluntarily submitted the case on the evidence before the Court when he made the following statement at

the very close of the case: "We submit it" (R1890). The demands for the right to put in further evidence came after the entry of an unfavorable decision.

---

(4) CLAIM OF RIGHT TO REHEARING EN BANC.

Counsel point to no law or authority, nor to any rule or intimation by any Court that counsel was entitled to have the petitioners' petition for rehearing *en banc* passed upon by all of the judges of the Circuit Court of Appeals for the Ninth Circuit. A rehearing *en banc* is not a matter of right. It is a matter of grace. If every petition for a rehearing *en banc* is required to be passed upon by the entire Court, each such petition would, in effect, bring about such hearing, since all of the judges would be required to pass thereon. If such rule were adopted, the very purpose of having more than three circuit judges in a circuit would be largely thwarted. The purpose of additional judges is to expedite the decision of cases. The rule for which counsel argues would decidedly slow down the procedure.

---

(5) CLAIM THAT DISTRICT COURT HAD NO POWER TO APPROVE A COMPROMISE AND DISMISSAL OF THE ACTION.

Whitten v. Dabney (171 Cal. 621, 154 Pac. 312) is the leading case in California dealing with the control of the Trial Court over derivative litigation. The California Supreme Court in that case held that the shareholder-plaintiff commencing derivative litigation to enforce the

rights of his corporation did so as a trustee; that his position was equivalent to that of a guardian ad litem; that he was permitted to sue simply in order to set in motion the judicial machinery of the Court and that after the commencement of the litigation, the Court, and not the shareholder, had the power to compromise the rights of the corporation. *Russell v. Weyand* (5 Cal. App. (2d) 259 (1935), 42 Pac. (2d) 381) held that the corporation and not the plaintiff was the real party-plaintiff in the action, that it was the duty of the Court, before whom the action was pending, to protect the interests of the corporation by exercising supervision over the conduct of the plaintiffs. *Loeb v. Berman* (217 Cal. 716 (1933), 20 Pac. (2d) 685) held that the corporation, when acting in good faith, could by a cross-complaint declare upon the same cause of action and, when it did so, the stockholder-plaintiff from that moment on became a supernumerary party.

The reasoning of the California Supreme Court is sound and logical. The Washington Supreme Court in *Goodwin v. Castleton* (144 Pac. (2d) (Wash. 1944) 725) reached the same conclusion. In fact, said Court cited the opinion of the District Court in the within case in reaching its conclusion. Delaware and Massachusetts reached a similar conclusion (*Karasick v. Pacific Eastern Corporation,* 180 Atl. (Del. 1935) 604, and *Cutter v. Arlington Casket Co.,* 151 N. E. (Mass. 1926) 167, at page 170). The United States Circuit Court of Appeals for the Ninth Circuit followed the principal of law enunciated in said California cases. It reached that conclusion due to the fact that it approved the principle of law and the fact that no Federal law to the

contrary was presented (R2003-2004). It did not base its decision upon *Erie R.R. Co. v. Tompkins* (304 U. S. 64) though, in our opinion, it might have done so. The case of *Cohen v. Young* (127 Fed. (2d) 721) is in entire harmony with the opinion of the Circuit Court of Appeals (135 Fed. (2d) 625).

All of the cases cited by petitioners in this connection (Petitioners' Brief, pages 58, 59) involved cases under the Chandler Act and not under rule 23(c).

In one breath, petitioners argue that the United States Circuit Court of Appeals erred in following the local law (Petitioners' Brief, page 67) and in the next breath argue that said Court should have followed the local law (Petitioners' Brief, page 65). Petitioners' difficulty is that they fail to appreciate what the local law is. They refer the Court to *Klopstock v. Superior Court* (17 Cal. (2d) 13, 108 Pac. (2d) 906, 135 A.L.R. 318) and *Eggers v. National Radio Co.* (208 Cal. 308, 281 Pac. 58), but these decisions are not in point, as the Court there dealt not with the control of the Court over a derivative suit once commenced, but with the right of a plaintiff-shareholder, or his representative, to commence derivative suits. *Whitten v. Dabney*, supra, is definitely the leading case in California on the question.

---

(6) CLAIM OF RIGHT TO CROSS-EXAMINE BANK OFFICIALS.

Two of the three bank officers (William H. Thomson, president, and Allard A. Calkins, first vice-president) the petitioners contend they had no opportunity to cross-exam-

ine were, in fact, cross-examined in open court (R1186, 1203, 1823, 1774). No request was ever made of the District Court of the right to cross-examine the third individual at the numerous hearings had before the entry of judgment and no plausible reason for not making such request has yet been given by petitioners.

---

(7) CLAIM OF PETITIONERS OF RIGHT TO TAKE DEPOSITIONS OF HIGH OFFICIALS IN WASHINGTON, D. C., AFTER ENTRY OF JUDGMENT DISMISSING THE ACTION.

A party-litigant's right to take depositions under rules 23 and 31 FRCP exists while the action is "pending" only—not after it has been terminated upon Court order. In making their application after judgment, petitioners made no showing of diligence or relevancy of the proof sought. In fact, the record before the District Court conclusively showed lack of diligence and lack of relevancy.

---

(8) CLAIM OF RIGHT, AFTER ENTRY OF JUDGMENT, TO FILE THIRD AMENDED COMPLAINT AND TO INTERVENE.

After the hearing on Anglo Bank's petition to terminate, and the entry of judgment dismissing said action, petitioners sought to file a third amended complaint, broadening their claims and setting up new causes of action. The application to amend was untimely and the District Court was fully justified and could only have denied such request (*Gallagher v. Pacific American*, 97 Fed. (2d) (1931) at 195, Ninth Circuit).

Petitioner Doble's application to intervene was not only after judgment and untimely, but it followed a motion made by her, prior to the hearing on the Anglo Bank's petition (R345), to intervene as party-plaintiff, which motion had been denied by the District Court (R398) without an appeal being taken. Furthermore, shareholder Doble appeared at said hearing on March 31, 1942, pursuant to an Order to Show Cause (R259), filed her written objections (R340) and participated in said hearing. Subsequently, she appealed to the Circuit Court of Appeals and through counsel presented to said Circuit Court oral arguments and a written brief. Under the holding of the Court in *Cohen v. Young* (127 Fed. (2d) 721, at page 724), she has been granted everything that she has requested, to which she is entitled.

The decision below does not present any question necessitating a review by the United States Supreme Court. It is not in conflict with any decision of any high Court, nor with any decision of another Circuit Court. No question of particular public interest is involved. The petitioners had their day in Court, but received an adverse decision upon a conflict of evidence. The Trial Court acted to protect the best interests of the Anglo Bank, the party for whose benefit the suit was commenced, instead of furthering the personal aims of the petitioners and their attorney, at the expense of the bank. The Appellate Court affirmed the judgment of the Trial Court while proceeding in the ordinary and usual manner. Evidence, if there be any, as

to claims of petitioners against the Reconstruction Finance Corporation and certain high officials in Washington, is wholly without the issues in the suit before the Trial Court and could not play any part in the deliberations of that Court, even though it had been timely presented.

Respondent urges that the Writ be denied.

Dated, San Francisco, California,
July 17, 1944.

Respectfully submitted,
ALLEN L. CHICKERING,
WALTER C. FOX, JR.,
VINCENT I. COMPAGNO,
Attorneys for Respondent.

CHICKERING & GREGORY,
Of Counsel.

(Appendix Follows.)

Appendix

The Anglo California National Bank of San Francisco (a respondent herein) is a national banking association and is the outgrowth of a consolidation on June 30, 1932, of The Anglo California Trust Company, a California State Bank, and The Anglo London Paris National Bank, a national banking association (for convenience, said consolidated bank is hereinafter referred to as "Anglo Bank").

E. H. Denicke is a stockholder of the Anglo Bank and became such at the time of the above-mentioned consolidation, he, prior to such consolidation, having been a stockholder of The Anglo California Trust Company. The number of shares held by Mr. Denicke is 1600 (R1045), or 6.08 of 1% of the total outstanding shares of said Anglo Bank. Mr. Denicke is one of the petitioners before the above-entitled Court, was the plaintiff in the District Court, and one of the appellants in the Circuit Court of Appeals.

The action in the District Court was commenced on November 7, 1938, by said Ernest H. Denicke, and purported to be a representative and derivative action brought by said shareholder for the purpose of making certain claims on behalf of Anglo Bank against a number of its officers and directors holding office for varying terms during the twenty-five years immediately prior to April 1, 1939, on which date there was a distinct change in the management of said institution, as well as against certain of the present directors of said Anglo Bank. Said Ernest

H. Denicke was represented in the District Court and the Circuit Court of Appeals by attorney Aaron M. Sargent.

Petitioner Mary E. Doble is a shareholder of Anglo Bank, holding 1752 shares (R282), which shares were acquired by her in The Anglo London Paris National Bank prior to the above-mentioned consolidation. Said Mary E. Doble was not a party to the action pending in the District Court, but several days prior to the hearing by the District Court of a petition filed by Anglo Bank to compromise said derivative action, an effort was made by Mary E. Doble to intervene (R364) in said action as a party-plaintiff. Said attempt to intervene was denied by the District Court but subsequently said Mary E. Doble appeared at the hearing on the Bank's petition to compromise pursuant to an Order to Show Cause why said action should not be compromised, sent out to all shareholders of record of Anglo Bank (March 31, 1942). She was then represented by attorney Aaron M. Sargent and filed objections (R340) through said attorney to the granting of the Bank's petition. Since the entry of the Judgment of the District Court approving the compromise and ordering the termination of the action, which judgment was reviewed by the Circuit Court of Appeals, said Mary E. Doble has participated in all proceedings taken in the same manner and through the same attorney as said Ernest H. Denicke.

The complaint, as originally filed (R925), was subsequently amended (R62) and supplemented (R290) so that at the time of the hearing on the Anglo Bank's petition to compromise, there was on file a second amended

complaint (R6), which had been amended and supplemented.

Said second amended complaint (R6) was in Eight Counts. The First Two Counts set forth the transactions upon which the action was predicated. The First Count was against the defendants Mortimer Fleishhacker and Herbert Fleishhacker, formerly directors and the chief executive officers of Anglo Bank, and the Second Count was against the same defendants, but in addition included Mortimer Fleishhacker, Jr., Empire Farms, Inc., Charles E. MacLean, R. H. Holmberg, Mandeville Island Farms, Roscoe C. Zuckerman, Sol Z. Klein and Jack Klein.

Counts Three to Eight, inclusive, set up claims against other directors of said banking association for the periods during which said directors served on said association's board, based on the transactions referred to in Counts First and Second, together with the claim that such directors, during the respective periods of their office, abdicated and delegated their duties to the defendants Herbert and Mortimer Fleishhacker, thereby defrauding said banking association.

The substance of the claim in Count First was that on January 1, 1920, defendants Herbert and Mortimer Fleishhacker conspired together to defraud one George Shima and said banking association's predecessor (The Anglo London Paris National Bank) by using their respective offices and control to cause predecessor bank to make loans to one George Shima, in excess of the legal loan limit, in violation of 12 USCA 84, in order to exact bonuses or emoluments from said George Shima. In support of this

claim, it was alleged that between the above date and the date of the death of George Shima on March 27, 1926, certain loans were made to George Shima; that subsequently, additional loans were made to his estate; that these loans were never repaid; that at the time of the making of said loans, the predecessor bank's loan limit never exceeded $500,000; that certain bonuses were received by Herbert Fleishhacker. In addition to the return of the principal, it was claimed that an interest charge should be exacted, determined by compounding 6% monthly over a long period of years.

Claims in the Second Count were as follows:

It was alleged that on January 1, 1930, the Shima Estate owed the predecessor bank amounts in excess of the bank's loan limit; that the predecessor bank held no security and the Shima Estate was insolvent. That defendants Herbert and Mortimer Fleishhacker conspired together to reorganize the Shima Estate and Shima enterprises in order to cover up their liability by reason of making excessive loans; that to bring about this reorganization, said Fleishhackers used their offices to cause the predecessor bank to advance additional sums to defray the additional expenses of reorganization. It is then alleged that on June 30, 1932, the predecessor bank was consolidated with Anglo California Trust Company to form the present banking association; that after such consolidation, defendants Mortimer Fleishhacker, Herbert Fleishhacker and Mortimer Fleishhacker, Jr., conspired together to cause Anglo Bank to advance monies for the purpose of improving Mandeville Island Farms, an asset of Empire Farms, Inc., a corporation which resulted from the foregoing reorganiza-

tion, in order that the Fleishhackers could subsequently purchase said asset at an inadequate consideration; that in order to further this conspiracy, Mandeville Island Farms, Inc. was formed, with Roscoe Zuckerman and Sol and Jack Klein its shareholders; that said stockholders were merely dummies; that the Fleishhackers then, through control of Empire Farms, Inc. (the Anglo Bank had become a large shareholder by accepting stock for the obligation of the Shima Estate) caused it to sell Mandeville Island to Mandeville Island Farms, Inc. for an inadequate consideration. It was then claimed that Anglo Bank made advances to Mandeville Island Farms, Inc. and that Empire Farms, Inc. likewise made advances to Mandeville Island Farms, Inc. and, in one instance, made gifts. It was further contended that defendants MacLean and Holmberg, as officers of Empire Farms, Inc. were merely dummies of the Fleishhackers; that Empire Farms, Inc. sustained damage in that it did not receive all of the purchase price of Mandeville Island and that through the sale of Mandeville Island, its financial position was so affected that it was unable to meet its obligation to Pacific Life Insurance Company, which held a mortgage on the Shima Tract, originally one of the assets turned over to Empire Farms, Inc. under the above reorganization.

$5,299,294.82 Damages Were Prayed For.

After a number of steps preliminary to trial had been taken, and the plaintiff had exercised about all of the forms of discovery (R925 to 956) available under the Federal Rules of Civil Procedure, and in excess of three years had elapsed, the various defendants, with the exception of Anglo Bank, filed their answers (R105 to 191) and

the case was at issue. In the meantime, the Anglo Bank had changed (April 1, 1939) its management, so that said management was in the hands of individuals (R241) who were not in any way connected with said litigation (R323). No answer or other pleading on behalf of Anglo Bank was filed, either admitting or denying any of the allegations in the various pleadings filed by the plaintiff and defendants. The new management of said Anglo Bank did, however, carry on an extensive investigation (R1057) concerning said litigation and claims made therein. Negotiations with both the plaintiff and the defendants were had looking toward the closing of the litigation (R1067) in a manner which would free said institution from the unfavorable publicity and expense of such litigation and, at the same time, place said banking association and its shareholders in the best possible position, having regard to all of the circumstances. As a result of said investigation and negotiations, said disinterested management had concluded that, if the within suit could be compromised and settled, along with another derivative suit which had been filed by the same plaintiff, through the same counsel, for the sum of $350,000, it would be to the best interests of said Anglo Bank and its stockholders that said compromise be effected (R1179). Accordingly, on July 1, 1941, said Anglo Bank, having received written offers from the various defendants to pay the sum of $350,000 in full settlement of all derivative claims made against them, filed a petition (R239) with the District Court under rule 23(c) FRCP to obtain Court approval of said proposed settlement and a dismissal of said litigation. Before said petition was filed, the offers of compromise in question were submitted to the disinterested members of the Bank's Executive

Committee and of its Board of Directors (R242). By unanimous action of both bodies, the advisability of such settlement was determined upon and said matter submitted to all the shareholders of the Anglo Bank. A special meeting of said shareholders was held on July 7, 1941, at which meeting the offers of settlement were presented (R1043), as well as the recommendations (R1130) of the disinterested members of the Bank's Executive Committee and of its Board of Directors. The matter was thrown open for discussion and Mr. Sargent, as the representative of the plaintiff, Mr. Denicke, and the petitioner, Mrs. Doble, read to the meeting a prepared written statement (R1137) recommending that the compromise settlement be not accepted, and giving his reasons. A complete transcript of the shareholders' meeting is in the record (R1117), said meeting having been reported and transcribed by the official Court Reporter at the order of the District Court. At the close of discussions, the motion, which had been made and seconded, that the action of the disinterested members of the Executive Committee and of the Board of Directors, in accepting the offers of compromise, be adopted subject to the approval of the District Court, was put to a vote. Less than 2/10 of 1 per cent (R1051) of the total outstanding stock of the Anglo Bank voted against the compromise of said litigation, and 77.5 per cent of this amount composed the shares owned by plaintiff, Mr. Denicke, and the petitioner, Mrs. Doble. More than 95 per cent of the total outstanding stock voted in favor of the resolution.

In accordance with the order of the District Court, and notice to shareholders, a hearing was commenced on July

14, 1941, on said Bank's petition to compromise and terminate the action in question (R989 to 1844). At this hearing, the District Court, the Hon. A. F. St. Sure, before whom the within litigation was pending, and the District Court, the Hon. Michael J. Roche, before whom the other derivative suit previously mentioned was pending, sat jointly. Since the two cases had not been consolidated, it was stipulated that all of the evidence offered and received would be deemed evidence offered and received in each case in which it was relevant. This joint hearing extended over six trial days, twelve witnesses were sworn and testified, thirty exhibits were offered by the plaintiff and received and thirteen exhibits were offered by the petitioner and received. Among the witnesses testifying was the president of the Bank, Mr. William H. Thomson (R1031) and the first vice-president, Mr. Allard A. Calkins (R1769), both witnesses whom appellants are now contending that they had no opportunity to cross-examine in open court. There were ten other witnesses who testified, among them Mr. Mortimer Fleishhacker, Sr. (R1448), one of the defendants that the plaintiff contends he never had an opportunity to cross-examine in open court. The District Courts allowed great latitude to counsel in their examination and were extremely liberal in receiving evidence offered. In fact, considerable evidence was offered by the plaintiff and received that did not lie within the issues submitted by the pleadings in either of said cases. After submission, written briefs (R1844) were filed by Mr. Sargent and the Bank's counsel, as well as by counsel for certain of the defendants. In January of 1942 (R287), it was determined by each of said District Courts that the Anglo Bank's petition to compromise and terminate said actions be de-

nied "without prejudice to the filing by said bank, if so advised, of separate offers of compromise in each of the actions". Thereafter, separate offers of compromise were received by the Bank looking towards the termination of said actions. In each action, said defendants offered (R391, 321) to pay the sum of $200,000.

As to the action pending before the Hon. Michael J. Roche, a petition was filed by the Anglo Bank on the second offer of compromise, a hearing had, and said action dismissed upon the payment to the Bank of $200,000. Neither the plaintiff, Mr. Denicke, nor the petitioner, Mrs. Doble, nor their attorney, Mr. Sargent, presented any objection to said compromise and dismissal at the final hearing, though previously to that time, they had interposed considerable objection. In fact, they approved it.

As to the case pending before the Hon. A. F. St. Sure, a hearing was had on the Anglo Bank's petition to terminate on March 31, 1942 (R1845). This hearing was noticed in the same manner that the previous joint hearing had been noticed. Written objections were filed by the plaintiff (R333) and Mrs. Doble (R340) prior to said hearing. They were each represented at said hearing by attorney Sargent, who cross-examined Mr. William H. Thomson, the president of the bank (R1856) and Mr. R. H. Holmberg, the assistant-secretary (R1849), each of whom testified at said hearing. At this hearing, it was stipulated by Mr. Sargent and counsel for the Bank that the entire record and proceedings in connection with the July, 1941 hearing be considered as evidence in the matter then being heard by the District Court (R1846) along with the oral argu-

ments and briefs then on file (R1888). At the close of said hearing, the matter was submitted to the District Court for decision. The record is clear in this respect (R1888-1890), though petitioners contended in the Circuit Court of Appeals that said matter was not submitted, but continued for further hearing. On June 29, 1942, the District Court entered its order denying the objections of plaintiff Denicke and shareholder Doble to the Bank's petition to terminate and granting the Bank's petition (R438). In granting the Bank's petition, the District Court rendered a written opinion (R440-457). On July 2, 1942, a judgment was entered, approving the compromise of the litigation and authorizing a dismissal with prejudice upon the Bank's receiving the sum of $200,000 (R458-463). Said sum was received and a dismissal with prejudice entered of record.

Thereafter, petitioners filed a number of papers in the proceeding, for example, a third amended complaint was filed (R538), a motion to confirm the intervention (R466) of shareholder Doble, a motion to permit the taking of depositions of a number of high officials in Washington, D. C., upon written interrogatories (R583, 584, 661, 679, 683, 691), a motion to permit the taking of depositions of certain other officials in Washington, D. C., upon oral interrogatories (R580), a demand for opportunity to cross-examine certain officials of Anglo Bank (R573), a motion for a further hearing on objections of appellants to the settlement of the litigation (R465), and a motion to vacate (R468) the final judgment dismissing the action with prejudice on July 2, 1942.

After hearing and oral arguments, said motions were denied on August 17, 1942, by the District Court (R737).

The petitioners then proceeded to take an appeal (R747) from, first, the final judgment dismissing the action with prejudice entered on July 2, 1942, and, secondly, the order made on August 17, 1942, denying the motions made after judgment dismissing the action.

The Reporter's Transcript supporting the judgment of the District Court entered July 2, 1942, consists solely of the transcription of the proceedings held on March 31, 1942 (R1845 to 1890) which incorporates, by stipulation of the parties (R1846), the Reporter's Transcript of the hearings held in July, 1941, and appears in the record on appeal at pages 989 to 1844, inclusive.

In designating and preparing the record on appeal, petitioners filed with the Clerk of the District Court, three narrative statements purportedly drawn pursuant to Rule 75(c) FRCP (R766, 844, 874). Excerpts from these narrative statements were printed in the record on appeal at the request of counsel for petitioners and appear at pages 766 to 894, inclusive. Said narrative statements, according to counsel for petitioners, were made up from, not testimony given by any witness at any hearing before the District Court or before any other public officer and subsequently submitted to the District Court, but from depositions filed with the Clerk after submission of the case, incomplete in many instances, unsigned in many instances, and never offered to the Court before dismissal of the action in any instance. Even at the present time they remain in the files of the Clerk of the District Court in their original sealed envelopes with seals unbroken.

Upon the designation by the petitioners of said narrative statements as a part of the record on appeal, the Anglo Bank opposed (R905) the inclusion of said statements on the grounds that they did not constitute testimony of witnesses or evidence of any kind or character before the District Court. Said opposition was presented to the District Court pursuant to Rule 75(h) FRCP and after hearing and oral argument, the District Court settled the differences between the parties in regard to said narrative statements by ordering that they be excluded from the record on appeal (R914, subparagraphs (c), (d), (e)). After the petitioners had docketed their record on appeal with the United States Circuit Court of Appeals, a motion was made by them in the Circuit Court of Appeals, pursuant to Rule 75(h), to correct the record (R1892) by including said narrative statements, on the ground that they were material omitted from the record on appeal by "error or accident". This motion of the petitioners was granted by the Circuit Court of Appeals (R1953). The motion appears at pages 1892 to 1898, inclusive, of the Record.

At the same time that the petitioners moved to enlarge the record on appeal, the Anglo Bank moved to dismiss the appeal of the petitioners from the District Court Order dated August 17, 1942, or its denial of the petitioners' motion to vacate the judgment of dismissal entered July 2, 1942 (R1909). Said motion was based in the main on the ground that an order denying a motion to vacate a final judgment under the circumstances existing in the case at bar is not an appealable order. The motion and affidavits in connection therewith appear at pages 1911 to 1952 of the Record. The Circuit Court of Appeals continued said

motion for determination at the time of the hearing on the appeal from the final judgment dismissing the action.

On February 15, 1944, written briefs having been filed by the petitioners, respondent Anglo Bank and others, an oral argument was had to the Circuit Court of Appeals, the Hon. Clifton Mathews, Albert Lee Stephens and William Healy sitting. Oral arguments were presented by counsel for respondent Anglo Bank and Aaron M. Sargent, acting as counsel for the petitioners. The cause was submitted for decision under date of February 15, 1944 (R1994), and under date of March 1, 1944, the Circuit Court of Appeals filed its written opinion (R1996-2004). A decree affirming the judgment of the District Court and granting costs in favor of the respondents was filed and entered upon the same day (R2004).

Petitioners, under date of March 28, 1944, filed a motion for an order vacating said judgment (R2005), together with certain supporting papers. The Circuit Court of Appeals, the Hon. Clifton Mathews and William Healy sitting, heard said motion on April 3, 1944 (R2057). Said motion was denied at the close of the oral argument thereof (R2060). Under date of March 28, 1944, a petition for rehearing by the Circuit Court of Appeals *en banc* was filed (R2017-2056). Said petition for rehearing was denied by order filed March 29, 1944 (R2061).

In the Supreme Court
OF THE
United States

Office Supreme Court, U. S.
FILED
SEP 23 1944
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1944

No. 155

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a national banking association), MORTIMER FLEISHHACKER, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, JR., GEORGE I. COCHRAN, PHILIP S. BAKER, R. D. BRIGHAM, WALTER E. BUCK, WALTER A. HAAS, PAUL E. HOOVER, WILLIAM F. HUMPHREY, SAMUEL KAHN, VICTOR KLINKER, WILLIAM B. REIS, PAUL SHOUP, LEON SLOSS, JR., LOUIS SUTTER, ALFRED B. SWINERTON, T. C. TILDEN, JOSEPH O. TOBIN, WILLARD O. WAYMAN, IRENE L. BERG, Executrix of the will of William H. Berg, Deceased, R. STANLEY DOLLAR and FRANK MOSS,
Respondents.

PETITIONERS' CLOSING BRIEF ON APPLICATION FOR WRIT OF CERTIORARI.

AARON M. SARGENT,
Hobart Building, San Francisco 4, California,
Attorney for Petitioners.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

	Pages
Discussion of Rule 3 of Circuit Court	1-4
Opinion discloses lack of concurrence	2
Deliberate error injected into record	3
Denial of hearing in District Court	5-8
Letter disclosing reliance on orders for continuance	7
Relief on the ground of mistake	8
Findings	8
Standard governing proceedings under Rule 23(c) FRCP	9
Derivative status—duty to following rule in Delaware & Hudson and Harrington cases	10
California law on derivative status	10
Cross-examination and discovery	11
Amendment and intervention	12
Conflict with Sixth Circuit	12-14
Comparison with ruling in Cohen v. Young, 127 Fed. 2d 721	12-13
Certiorari as of course in cases involving conflict between circuits	14
Reply to statement of facts in brief of Anglo Bank	14, i-xi
Grounds sustaining issuance of discretionary writ	15
Certiorari as of right—direct appeal	16
Grounds for review as of right	17

Appendix

Reply to statement of facts in brief of respondent Anglo Bank	i-xi
Condition of the record	i
Amount of stock	ii
"New Management"	ii-iv
Amendments to pleadings	iv

Pages

Opportunity for discovery iv
Stockholders' meeting July 7, 1941 v
Cross-examination in July 1941 vi
Transcript on appeal vii
Scope of appeal vii

Standards required for approval of settlement ..... viii-x

New evidence tendered within rule in Chandler Act Cases .. x

Conclusions xi

Reference to matter of counsel fees xii

Table of Authorities Cited

Cases	Pages
Ashwander v. Tennessee Valley Authority, 297 U.S. 288....	ii
Blum v. Fleishhacker, Oct. Term 1940, Case No. 181.....	ii
Boynton v. Hutchinson Gas Co., 292 U.S. 601.....	18
Case v. Los Angeles Lumber Products Co., 308 U.S. 106..11, ii, ix	
Cohen v. Young, 127 Fed. 2d 721.....9, 12-14, x	
Cohens v. Virginia, 19 U.S. (6 Wheat.) 264.....	16
Consolidated Rock Products Co. v. DuBois, 312 U.S. 510..	x
Consolidated Securities Co. v. Belmont, 206 N.Y. 7, 99 N.E. 138, Ann. Cas. 1914A 777.....	vi
Delaware & Hudson Co. v. Albany & Susquehanna R.R. Co., 213 U.S. 435.....10, 15	
Doctor v. Harrington, 196 U.S. 579.....10, 15	
Dwyer v. United States, 170 Fed. 160.....	vii
Elggren v. Wooley, 228 Pac. (Utah) 906.....	vi
Federal Deposit Insurance Corp. v. Mason, 115 Fed. 2d 548	x
First Trust & Savings Bank v. Iowa Wisconsin Bridge Co., 98 Fed. 2d 416, 305 U.S. 650, 305 U.S. 676.....	vi
Florida v. Mellon, 273 U.S. 12.....	18
Ford v. Ford Roofing Co., 285 S.W. 538 (Mo. 1926).....	vi
Goess v. Ehret, 85 Fed. 2d 109.....	x
Gross Iron Co. v. Paulle, 156 N.W. 268 (Minn.).....	vi
Jones National Bank v. Yates, 240 U.S. 541.....	x
Keenan v. Eshleman, 2 Atl. 2d 904 (Del. 1938), 120 A.L.R. 227	vi
Kelley v. Everglades Dist., 319 U.S. 415.....	x
Loft Inc. v. Guth, 2 Atl. 2d 225 (Del. Ch. 1938).....	vi
Matter of Kings County Elevated R.R. Co., 78 N.Y. 383...	3
Mattox v. United States, 146 U.S. 140.....	vii
Michelsen v. Penney, 135 Fed. 2d 409.....	x

Pages

National Surety Co. v. Coriell, 289 U.S. 426 ix

Ogden v. United States, 112 Fed. 523 vii

Paine v. St. Paul Union Stock Yards Co., 35 Fed. 2d 624 .. vii
People v. Ruef, 14 Cal. App. 576, 620-632, 114 Pac. 54 3
Pepper v. Litton, 308 U.S. 295 ..... 11, 15, ii

Securities & Exchange Commission v. O'Hara Re-Election Committee, 28 Fed. Supp. 523 vi
Securities & Exchange Commission v. United States Realty & Improvement Co., 310 U.S. 434 ix
Stetson v. Stindt, 279 Fed. 209 vii

Thomas v. Taylor, 224 U.S. 73 x

Whitten v. Dabney, 171 Cal. 621 10

Codes and Statutes

Constitution of the United States:
Article III, Sec. 1 17
Article VI 17
Amendment V 16, 17

Judicial Code:
Section 128 16
Section 240 16

California Statutes:
Civil Code Sec. 375 iii
Stats. 1943, Chapter 1934 iii

Federal Statutes:
15 U.S.C.A. 604 ii
15 U.S.C.A. 605b(b) vi
28 U.S.C.A. 225 16
28 U.S.C.A. 347 16

Rules

Supreme Court:
Rule 38 15

Circuit Court:
Rule 3 ..... 1, 2

Federal Rules of Civil Procedure: Pages
Rule 23(c) ..... 9, 12, 14, 15, ix
Rule 26(d) sub. 1 viii
Rule 30 viii
Rule 52 ..... 8, 9
Rule 60(b) 8
Rule 75 (e) viii
Rule 77(b) iii

Texts and Miscellaneous

5 California Law Review, issue of December 1943, page 515. iii

Jurisdiction of the Supreme Court of the United States—
Robertson & Kirkham, pages 543, 563 ..... 14, 18

Supreme Court Journal, Jan. 22, 1934, p. 137 18

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 155

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a national banking association), MORTIMER FLEISHHACKER, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, JR., GEORGE I. COCHRAN, PHILIP S. BAKER, R. D. BRIGHAM, WALTER E. BUCK, WALTER A. HAAS, PAUL E. HOOVER, WILLIAM F. HUMPHREY, SAMUEL KAHN, VICTOR KLINKER, WILLIAM B. REIS, PAUL SHOUP, LEON SLOSS, JR., LOUIS SUTTER, ALFRED B. SWINERTON, T. C. TILDEN, JOSEPH O. TOBIN, WILLARD O. WAYMAN, IRENE L. BERG, Executrix of the will of William H. Berg, Deceased, R. STANLEY DOLLAR and FRANK MOSS,
Respondents.

PETITIONERS' CLOSING BRIEF ON APPLICATION FOR WRIT OF CERTIORARI.

CCA Rule 3 is not "for the guidance and protection of the clerk". It is a provision defining the nature and extent of his authority during adjournment.

According to counsel, the clerk had a right to obey—*and he had a right to disobey.* If so, why was such a rule adopted? Why did the entire Court join in a solemn and unanimous act of signing and filing the amendment which appears at page 5 of our petition?

"**Unanimous.**"

The opinion shows on its face that it was not unanimous.

> "**We** need not stop to inquire . . . the opinion already sufficiently indicates **our view** . . . **We** find no merit in other points argued.
>
> Affirmed.
>
> William Healy,
> United States Circuit **Judges.**"

"**Informing the Clerk.**"

Counsel suggest that,

> ". . . the Court should be and was free to adopt any appropriate method of informing its ministerial officer of a decision reached." (Brobeck p. 16.)

Circuit Judge Mathews made the following statement on April 3, 1944:

> ". . . the clerk was authorized to do what he did. The opinion was unanimous. The clerk's action was in accordance with the direction of the Court . . ." (R. 2058.)

On this occasion petitioners were informed that *it was none of their business whether Rule 3 had been obeyed.* (R. 2058.)

The document evidencing amendment of that rule was signed by Judge Mathews in November, 1936. His associates were equally familiar with its terms. Deliberate error has been injected into the record.

This condition may not be accidental. Our attention has been directed to an unusual opinion, rendered by the California Supreme Court, while sitting in bank at San Francisco. See

People v. Ruef, 14 Cal. App. 576, 620-632,

where an order was held invalid for want of a sufficient number of concurring signatures. We quote from that opinion:

> ". . . *the joint action or concurrence of four justices* is the thing required to constitute the action of the court. . . . *In contemplation of law, this joint action is taken when four justices have in writing declared their concurrence* in a particular order or judgment, with intent to make it an order or judgment . . ." (14 Cal. App. 624.)

> "When Justice Henshaw left the state, no other Justice had joined with him in assenting to such order, *and the assent theretofore given by him amounted to nothing more than an indication by him to his associates of his then willingness to concur . . . Such previously indicated assent . . . is ineffectual for any purpose . . .*" (14 Cal. App. 629-630.)

See also:

Matter of Kings County Elevated R.R. Co., 78 N.Y. 383,

where the Court held invalid, an opinion containing only one signature.

> ". . . A term may be held by two or three judges, but at least two must concur in any judgment to be

rendered. A single member can decide nothing . . . *That the absent judge has previously indicated his conclusion is not enough, for he must participate or take part when the decision is actually made, to render it lawful.*" (78 N.Y. 385-386.)

Rehearing in bank was not "a matter of grace" on the facts here presented. *We were entitled to have our case considered by judges not involved in a violation of Court rules.* So far as we can determine, no one ever acted except Judges Mathews, Stephens and Healy. (R. 2061.)

DENIAL OF HEARING IN DISTRICT COURT.

The petition was not submitted. There was a conversation between the Court and counsel. It was suggested that counsel submit the case on the petition. Discussion followed. The Court decided not to act upon that suggestion. *On its own motion, it continued the petition for a further hearing.*

There is a dispute which concerns the reporter's transcript. The last page was incomplete. We covered that matter by an affidavit in the Circuit Court. This states:

> "The reporter's notes are incomplete in that there was no record made of the following conversation occurring just before the case was continued for further hearing.
>
> "*The Court stated that there was some doubt as to whether appellants' motion for a nonsuit should be granted forthwith or whether it would be advisable to continue the case for a further hearing and to then pass upon this nonsuit motion.* After some reflection, the court decided to continue the case for a further hearing. A conversation to that effect took place be-

tween the Court and counsel just before the following entries, which appear at the end of the reporter's transcript:

"'The Court. Very well, I will continue this matter until the 21st of April.

"'(The further hearing of the matter was thereupon continued until Tuesday, April 21, 1942.)'" (R. 1936.)

There are counter-affidavits by the clerk and reporter. (R. 1949, 1950.) Those witnesses could not recall the statement quoted. On that issue there is a conflict. The other facts are beyond dispute.

On March 31, 1942 the petition was continued for a further hearing. The minute order so provides:

"This case came on regularly . . . on petition of defendant Anglo California National Bank of San Francisco to terminate action . . . R. H. Holmberg and W. H. Thomson were sworn and testified on behalf of the defendant. Mr. Sargent offered in evidence and filed certain exhibits which were marked Plaintiff's Exhibits Nos. 1, 2, 3, and 4. Mr. Sargent then moved the court to deny the petition. The matter was argued by Mr. Sargent and Mr. Williams, *and the further hearing hereof continued to April 21, 1942.*" (R. 392.)

That entry is the best evidence—in fact, it is the only competent evidence of the action taken on this petition. It records what the Court decided. It discloses what the Court actually did. That entry is confirmed by other documents:

We quote from the clerk's work sheet:

"Mr. Sargent moved Court to deny Petition. Sub. on argument by Mr. Sargent & Mr. William. *Further Hrg Cont Apr 21—*". (R. 1937.)

A continuance is disclosed by the last entry in the reporter's notes:

> "(The further hearing of the matter was thereupon continued until Tuesday, April 21, 1942.)" (R. 1890.)

The petition was not continued "for convenience". It was the practice of the District Court to take matters off calendar and to keep them off calendar while under submission. That practice was invariably followed in the case at bar. Those facts are shown by affidavit. (R. 1928.)

Continuances after March 31, 1942.

On five subsequent dates, this petition was continued for a *further hearing*. An appropriate entry was made on each occasion:

April 13, 1942—Continued to May 5, 1942. (R. 398.)
May 1, 1942—Continued to May 19, 1942. (R. 399.)
May 13, 1942—Continued to June 19, 1942. (R. 402.)
June 13, 1942—Continued to July 1, 1942. (R. 429.)
June 22, 1942—Continued to August 18, 1942. (R. 438.)

These objections were on the calendar when judgment was entered. They were set for August 18, 1942. (R. 438, 476.)

Amended objections were filed May 20, 1942. (R. 403.) Counsel were served on that date. They received the following letter:

"Aaron M. Sargent
Attorney at Law
1115 Hobart Building
San Francisco, California
EXbrook 1447

May 20, 1942.

Messrs. Chickering & Gregory,
111 Sutter Street,
San Francisco, California.

Mr. Fisk:

Subject—Denicke v. Anglo California National Bank—No. 21033-S.

Dear Sirs:

You will find enclosed herewith copy of plaintiff's objections interposed in opposition to the petition of the bank for approval of compromise and for termination of the litigation, the original of which was filed with the clerk of the District Court today.

As I understand the record in this matter, according to the minute order entered Mar. 31, 1942, there is now pending a motion by plaintiff for a nonsuit with respect to the petition of the bank for termination of the litigation. In case there should be an order denying this motion for nonsuit, plaintiff is entitled to introduce evidence in support of his objections.

Under these circumstances, we desire to have a full hearing in order to introduce proof of those matters which were not within our power to establish by evidence at prior hearings. Such evidence includes particularly, proof of the actual amount of damages sustained, introduction of evidence to establish the unconditional liability of the parties affected for the losses which are set forth in plaintiff's amended objections, and proof of the liability of the directors therefor.

We contemplate making an application to the court for such relief inasmuch as we were unable to present such proof at a prior date.

Very truly yours,

AARON M. SARGENT.

AMS/EM
Enc."

(R. 1941.)

We were ready for trial. Our objections were on the calendar—*set for hearing on August 18, 1942.*

We expected the court to call that calendar and announce our case.

It was the constitutional duty of the District Court to make that announcement.

MISTAKE.

We had an absolute right to relief on the ground of mistake. An application was made under Rule 60 (b) FRCP and arbitrarily denied. (R 468, 471, 737.) This ground is specified in our petition and brief.[1] Respondents have nothing to say.

FINDINGS.

General findings are not permitted. Rule 52 requires the Court to find the facts, *specially,* in *all cases.*[2]

---

[1]Petition, p. 25, par. 6. Brief specifies this error at p. 43, par. 6; discussion at p. 57.

[2]Rule 52: "In *all actions* tried upon the facts without a jury, the court shall find the facts *specifically* and state separately its conclusions of law thereon and direct the entry of the appropriate judgment . . ."

A dispute over a compromise is *an action,* in a very real sense. It involves litigation as between the corporation and its stockholders. Where *facts* are determined it is necessary to make *findings.*

The so-called finding of "good faith" is a recital taken from the decree. It presents a mixed question of law and fact. The merger of those questions into a recital was in itself a violation of Rule 52 FRCP. Good faith depends on conduct. Conduct is a question of fact, to be determined as any other fact—by evidence. It should be included in findings. Those findings will show *what happened.* The law will then determine whether such conduct was good or bad,—fair, or unfair.

The District Court could not avoid its responsibility by combining law and fact into a general recital.

The violation of Rule 52 FRCP is flagrant. The refusal to follow decisions of this Court, is obvious. For a violation thereof, a writ should issue.

STANDARDS GOVERNING PROCEEDING UNDER RULE 23(c) FRCP.

This point is not argued. Counsel suggest that we have denied the power of compromise with Court approval. Not so. We admit the existence of that power. *We insist upon its exercise according to proper standards.*

It is clear that the decision in *Cohen v. Young,* 127 Fed. (2d) 721, should have governed the proceedings in the District Court; and that the decisions of this Court in Chandler Act cases should have been applied.

The Circuit Court ignored that argument. It is necessary to obtain a ruling on certiorari.

DERIVATIVE STATUS.

The derivative facts are conclusive. We are entitled to manage and control the litigation under the decisions of this Court in the *Delaware & Hudson,* and *Harrington* cases.[3]

We claim derivative status, subject to the power of compromise, in a proceeding conducted according to proper standards in line with the rule in Chandler Act cases.

This point is not argued by counsel. It was ignored by the Circuit Court. It is necessary to obtain a ruling on certiorari.

CALIFORNIA LAW ON DERIVATIVE STATUS.

There is no essential difference between the local law and the federal law. California recognizes a property right sufficient to support an action. It accords stockholders the right to sue where the corporation is involved in collusion or is hostile to the minority.[4]

Counsel rely on dictum in *Whitten v. Dabney,* 171 Cal. 621. It is there suggested that a plaintiff shareholder is merely a guardian *ad litem.* Counsel then argue that such stockholder may be supplanted whenever the corporation appears on its own behalf. Local decisions do not recog-

---

[3]*Delaware & Hudson Co. v. Albany & Susquehanna R.R. Co.,* 213 U.S. 435; *Doctor v. Harrington,* 196 U.S. 579.

[4]Cases cited in petition p. 17, and in brief at pages 65-68.

nize that principle. It is uniformly held that a corporation, *acting in good faith,* may compromise with Court approval.

We have claimed the right to litigate the good faith of this corporation, as a question of fact. We have demanded a trial of that issue. We have appealed from a judgment which indulges a presumption of good faith without trial.

Actually, the bank seeks realignment. It was joined as a party defendant. It can become a plaintiff, only by compliance with federal rules. These rules require a trial of that issue.

CROSS-EXAMINATION AND DISCOVERY.

In the constitutional sense this suit was *pending.* An arbitrary "dismissal" filed without notice, did not terminate the proceeding. Our demands for cross-examination were an essential part of our demand for a trial. Demands for testimony by deposition, stand on the same basis.

Materiality of the proof was clear. It was proper to inquire into the conduct of the majority shareholder. (*Pepper v. Litton,* 308 U.S. 295.) The settlement could not be approved without determining that it would be "fair and equitable". (*Case v. Los Angeles Lumber Products* Co., 308 U.S. 106 at 114.)

AMENDMENT AND INTERVENTION.

Mrs. Doble could intervene, as of right, when the District Court denied Mr. Denicke the right to continue as representative of all stockholders. Her prior application for intervention involved a discretion. The ruling thereon was not appealable.

An amended pleading was lodged with the clerk. This set up the facts, as developed by discovery. We were entitled to file it in aid of our right to a trial.

CONFLICT WITH SIXTH CIRCUIT.

We submit the following comparison with *Cohen v. Young,* 127 Fed. (2d) 721.

Scope of Proceeding under Rule 23(c).

> "The rule provides for notice to stockholders not only in order that they may have the right to be heard, but also in order that the court may have the benefit of that broader information which comes from receiving advice as to the views of all parties concerned and from considering evidence . . . upon the relevant points of the case. . . . The rule was adopted to secure not routine approval of a consent decree, but in order to insure supervision of the court for the protection of the corporation and all the stockholders." (127 Fed. (2d) at 725.)

In our case, the District Court presumed good faith without trial. It refused to admit proof bearing on the conduct of the parties who handled the negotiation.

Documentary Proof Incorporated in the Record.

> "The documents relied upon by the attorneys should have been incorporated in the record. The appellant had a right to invoke the discretion of the court to decide whether the compromise recommended did in fact protect the interest of the corporation and of the stockholders." (127 Fed. (2d) 725.)

Depositions were on file. We sought to read them into the record. We tried to introduce an auditor's report. There was an arbitrary refusal to admit proof.

Duty to Investigate.

> "It was the duty of the court to consider the available evidence in this light . . ." (Whether compromise protected interests of corporation and stockholders.) ". . . its refusal or failure to consider it . . . deprived the appellant of a substantial right." (127 Fed. (2d) 725.)

Fair and Equitable.

> ". . . the derivative nature of the claims requires that the compromise approved be adequate and fair to all concerned." (127 Fed. (2d) 725.)

The District Court did not determine the amount of the liability. It failed to get at any of the facts required for the exercise of independent judgment.

Findings.

> "The exercise of discretion does not permit the Court to disregard the substantive principles of law established for the protection of litigants. One of these principles is that judgments and decrees which make findings of fact shall be founded on evidence. . . . The Court was bound to hear the legal testimony

concerning the compromise. Otherwise it could not safely decide the question of its propriety." (127 Fed. (2d) 726.)

There were no findings. Nothing but a general recital in the decree. No determination of issues raised by objections.

"Where the decision of the Circuit Court of Appeals, sought to be reviewed by certiorari, directly conflicts upon a question of federal law with the decision of another Circuit Court of Appeals upon the same question, the Supreme Court grants certiorari as of course, and irrespective of the importance of the question of law involved. The importance in such cases lies in the preservation of uniformity of decisions in the federal courts upon points solvable by federal law—a basic purpose of the certiorari jurisdiction since its inception in 1891."[5]

This conflict is concerned with Federal Law, viz.: the application of Rule 23(c) FRCP to compulsory settlement of a stockholder's suit.

The decision in the Sixth Circuit cannot be reconciled with what happened in the case at bar.

This condition requires issuance of a writ.

The appendix to this brief contains a reply to the "Statement of Facts" attached to the brief of respondent bank.

---

[5]Jurisdiction of the Supreme Court—Robertson & Kirkham, Section 292 at page 563.

GROUNDS SUSTAINING ISSUANCE OF DISCRETIONARY WRIT.

Where a Circuit Court performs its duty under Section 128 of the Judicial Code, a review in this Court is limited to the grounds specified in Rule 38. The following questions require issuance of a writ under that rule:

1. Standards governing opinion writing in Circuit Court.

2. Duty to grant rehearing in bank because of failure to determine specified questions submitted in support of appeal.

3. Conflict with Sixth Circuit.

4. Standards governing action of District Court under Rule 23(c) FRCP.

5. Application of Chandler Act cases.

6. Duty of District Court to nonsuit the petition in view of decisions in *Delaware & Hudson Co. v. Albany & Susquehanna R.R. Co.*, 213 U.S. 435, and in *Doctor v. Harrington*, 196 U.S. 579.

7. Application of decision in *Pepper v. Litton*, 308 U.S. 295, 306.

8. Right to litigate good faith of bank management under the principles expressed therein.

9. Right to cross-examine the bank officers who handled the settlement negotiations.

10. Right to take depositions of RFC officials to develop facts involving merits of the compromise.

11. Right to take depositions of other federal officials, bearing on the same matter.

12. Right to a *subpoena duces tecum*, directed to the Chief National Bank Examiner.

CERTIORARI AS OF RIGHT—DIRECT APPEAL.

This case involves more than a discretionary review. The Circuit Court has failed to discharge its responsibility. No valid judgment was entered in that Court. The opinion filed during adjournment fails to dispose of the questions presented. There has been a failure in the administration of justice.

Under these conditions, review in this Court becomes a matter of right. A certiorari petition then becomes, for practical purposes, a petition for appeal. The denial of due process in a Circuit Court imposes a special obligation on this Court. A denial of certiorari in such a case would violate the Constitution of the United States. We cite the following authority in support of that contention:

(1) Judicial Code Section 128 (28 USCA 225) provides:

> "The Circuit Courts of Appeals *shall have appellate jurisdiction* . . . in all cases save where a direct review may he had in the Supreme Court . . ."

(2) *Cohens v. Virginia,* 19 U.S. 264, at 403, holds that the duty to exercise this jurisdiction, is *absolute.*

(3) The Fifth Amendment requires a Circuit Court to afford due process—*to exhaust its jurisdiction when a case is properly laid before it.*

(4) Judicial Code, Section 240 (28 USCA 347), confers on this Court the *power* "in any case" to require that a matter be certified here for review. *That section contemplates* that this Court act as guardian of the constitutional rights of litigants in the Circuit Courts,—*that it enforce their rights where due process is denied.*

(5) Due process under the Fifth Amendment requires the exercise of that power—where due process is denied in a lower federal court.

(6) This Court has *supreme power* over "inferior courts (which) the Congress may from time to time ordain and establish". (Const. Art. III, Sec. 1.)

(7) Responsibility is equal to power—a duty and not a discretion governs its exercise.

(8) The constitution is the "supreme law of the land". (Art. VI.)

GROUNDS FOR REVIEW, AS OF RIGHT.

(1) To vacate the void entries made in the Circuit Court.

(2) To protect our right to a decision, by an appellate court, on the questions not determined in the Circuit Court.

(3) To grant relief from the arbitrary and unjudicial conduct of the Circuit Court which resulted in a denial of due process in that Court.

(4) To vacate the judgment entered without trial in the District Court.

(5) To enforce petitioners' right to a decision in accordance with precedent.

APPLICATION FOR ORAL ARGUMENT.

These questions are unusual. Their importance is tremendous.

In *Boynton v. Hutchinson Gas Co.*, 291 U.S. 656, a novel and important question was presented. This Court ordered oral argument on the question whether certiorari should be granted, and thereafter made an order for issuance of a writ.[6]

We submit that the public importance of these questions justifies the making of such an order in the case at bar.

Dated, San Francisco, California,
September 19, 1944.

Respectfully submitted,
AARON M. SARGENT,
Attorney for Petitioners.

(Appendix Follows.)

[6]Jurisdiction of the Supreme Court of the United States—Robertson & Kirkham, p. 543; Supreme Court Journal, Jan. 22, 1934, p. 137. See also *Florida v. Mellon*, 273 U. S. 12.

Appendix

The brief filed by respondent Anglo Bank includes, in an appendix, a purported statement of facts. The following comments are in order:

Condition of the Record.

This appeal is based upon denial of a hearing on objections to a settlement. Issue was joined by the following pleadings:

1. Petition for termination of suit. (R. 314.)
2. Objections of petitioners Denicke and Doble. (R. 333, 340.)
3. Amended objections of petitioner Denicke filed after discovery. (R. 403.)

Proceedings on the Petition.

There was no evidence except that offered by the bank as part of its case in chief. This consisted of:

(a) *Testimony of bank officers.* William H. Thomson, President, and R. H. Holmberg, Assistant Secretary, testified at the request of the bank and were subjected to a cross-examination limited to examination in chief. (R. 1853-1882; 1846-1853.)

(b) *Documents offered during presentation of bank's case.* The Court received letters used on cross-examination of Thomson (R. 1857, 1863, 1865, 1870). As a part of its case, the bank offered the transcript and exhibits of July 1941. (R. 1846.)

And that was all. There was no hearing on objections. No evidence on objections. *The matter was continued* for *further hearing.* (R. 392.)

There is no presumption of good faith which can be indulged in favor of this corporation. Its conduct is subject to the same scrutiny which the law applies to others. (15 USCA 604.)

There was a motion for nonsuit. The District Court declined to rule on that motion. (R. 1888, 392, 438, 439.)

A hearing was demanded. A hearing was denied. There is no occasion for considering an alleged "statement of facts" based upon evidence offered by one side. It will be time enough to determine the essential facts when a full hearing has been granted.

We are including comment on some statements which appear in the appendix to the Anglo brief in order that this Court may have a more accurate picture of the situation.

Amount of stock. (Page i.)

Mr. Denicke and Mrs. Doble hold 1600 and 1752 shares, respectively. Their investment totals $100,000. They have a right to be heard. (*Pepper v. Litton,* 308 U.S. 295; *Case v. Los Angeles Lumber Products Co.,* 308 U.S. 106; *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288.)

"New management"—April 1, 1939. (Page i.)

Between April 1, 1939 and February 14, 1940, the bank prosecuted an appeal from a judgment rendered in its favor of *Blum v. Fleishhacker.*[7]

---

[7]Judicial notice is taken of contents of transcript on file in this Court in *Fleishhacker v. Blum,* Oct. Term 1940, Case No. 181, disclosing action of Anglo Bank contrary to stockholders' interests in that proceeding.

Denicke demanded abandonment of that appeal. The management was notified that it would be held liable for consequences. (R. 1569 at 1573.)

We were then informed that this matter had just come to the attention of the bank's counsel. (R. 1574.)

An explanation was requested. (R. 1205, 1578.) There was no explanation. (R. 1198-1199.)

On April 1, 1939, counsel now acting for the bank were engaged in an effort to dismiss suit on behalf of executive committee members charged with liability herein. (R. 51, 60.)

On April 21, 1941, the bank filed false answers to interrogatories. It concealed $3,901,067.18 in loans involving directors.[8]

Denicke insisted on appointment of independent counsel. (R. 1651 at 1665, 1667.) For at least five years, money belonging to stockholders had been expended in maintaining a collusive representation of their interests.[9]

Petitioners have demanded a trial. Their objections and offers of proof contain the following allegations which can only be determined by a hearing in open Court in accordance with Rule 77(b) FRCP:

> "The matter now before the court is being pressed with knowledge that the settlement figure tendered is inadequate; that *independent counsel would be successful in obtaining a much larger amount . . .*" (Offer No. 20 at R. 524.)

---

[8]See schedule at page 15 of Petition for Certiorari.

[9]Use of corporate funds to pay litigation expense of directors held guilty of misconduct—amounts to breach of trust. (See California Civil Code Sec. 375 amended by Stats. 1943 Chapt. 1934; also Article by Prof. H. W. Ballantine, at 5 Cal. Law Review Dec. 1943 page 515.)

> *"A low figure was purposely presented in order to bring about an auctioning of these claims.* This was part of a plan to enable the directors to avoid substantial liability." (Offer No. 24 at R. 529.)
>
> "The statement in said petition that the bank has made a careful investigation . . . that it has determined in good faith that (the litigation) be compromised, is untrue. *Neither the president nor the board of directors, nor the executive committee, nor counsel for the bank, have ever made such determination.*" (Offer No. 24 at R. 528.)

Amendments to pleadings. (Pages ii-iii.)

There was no opportunity for adequate discovery until after March 31, 1942. All prior pleadings were in skeleton form. We amended to meet an attack on the jurisdiction. The second amended complaint was filed after directors sought to dismiss on the merits. An amendment was lodged in September 1941, to prevent loss of rights on directors' loans. (R. 958, Item 367; 290.) The third amended complaint was lodged after entry of an ex parte decree. It is the only pleading ever presented after opportunity for discovery. (R. 537.) The bank opposes the right to file that document.

Opportunity for discovery. (Pages v-vi.)

Until February 28, 1940, there was no chance to maintain discovery. On this date, the Court denied motions to dismiss. (R. 81.)

The bank opened negotiations for settlement when we took the deposition of Mortimer Fleishhacker. (R. 775, 1507, 1508.)

There were interrogatories involving directors' loans. (R. 84.) Chickering & Gregory insisted that these constituted an investigation into the affairs of "customers". When objections were overruled, the bank answered concealing accounts totalling $3,900,000.

There was a petition for general settlement in July 1941. (R. 239.) Determination of that question delayed action until January 27, 1942, when that proposal was denied. (R. 288.)

Discovery was resumed immediately. On February 26, 1940, the bank was ordered to exhibit ledger cards and minute books. (R. 298.) Ledger cards were not examined until early in April because it was necessary to obtain photostats for our auditor. (R. 393.)

On March 30, 1942, the bank was compelled to reveal a file of letters from the Comptroller of the Currency. (R. 365.)

The damages were not ascertained until May 1942. At that time Mr. Denicke filed amended objections. (R. 403.)

Most proof material to the settlement was obtained while objections were on the calendar awaiting trial.

Stockholders' meeting July 7, 1941. (Page vii.)

This meeting was called to consider the general settlement rejected by the District Court on January 27, 1942. (R. 288.) It was not conducted in a manner that would reflect the opinions of stockholders. Management proxies voted most of the common. (R. 1047.) These proxies were solicited without disclosure of material facts. (R. 251, 253,

254.) Voting power obtained without a full and fair disclosure is not binding for any purpose.[10]

Cross-examination in July 1941. (Page viii.)

There was no opportunity to confront witnesses with documents and records obtained after March 31, 1942. On cross-examination we propose to use the following material:

1. Correspondence with Comptroller of the Currency examined under Court order dated March 30, 1942. (R. 365.)

2. Minute books of bank examined in March and April, 1942, pursuant to Court order dated February 26, 1942. (R. 298.)

3. Letter from bank to Comptroller of the Currency under date July 11, 1933, for delivery of duplicate bank examiners' reports to RFC. (R. 660.)

4. Deposition of director Walter E. Buck taken March 26, 1942. (R. 888 at 891-894.)

5. Deposition of H. L. Machen, bank officer and former Federal Bank Examiner, taken April 24, 1942. (R. 879-886.)

6. Certified copy of entry in report filed by RFC with the secretary of the United States Senate in June, 1933, pursuant to 15 USCA 605b(b) disclosing interest rate

---

[10] *First Trust & Savings Bank v. Iowa-Wisconsin Bridge Co.*, 98 Fed. (2d) 416, cert. denied 305 U. S. 650, rehearing denied 305 U. S. 676; *Securities & Exchange Commission v. O'Hara Re-Election Committee*, 28 Fed. Supp. 523; *Gross Iron Ore Co. v. Paulle*, 156 N. W. 268 (Minn.); *Elggren v. Wooley*, 228 Pac. (Utah) 906; *Keenan v. Eshleman*, 2 Atl. (2d) 904 (Del. 1938), 120 ALR 227; *Ford v. Ford Roofing Co.*, 285 S.W. 538 (Mo. 1926); *Loft Inc. v. Guth*, 2 Atl. (2d) 225 (Del. Ch. 1938); *Continental Securities Co. v. Belmont*, 206 N.Y. 7, 99 N.E. 138, Ann, Cas. 1914A 777 at 778, 781.

fixed on the September Company loan discussed at pages 80-82 of our brief.

7. Auditor's report prepared in May, 1942, showing a loss of $4,029,449.52, and that settlement would pay only five percent of the sum.

Transcript on appeal. (Pages xi-xii.)

The bank opposed printing of a record that would include proceedings after judgment. That issue was determined in our favor by an order entered by Circuit Judges Garrecht, Haney and Healy on March 25, 1943. (R. 1892, 1953.)

Judge Haney died before argument on the merits.

Circuit Judge Garrecht was eliminated from the panel. That action has never been explained.

Circuit Judge Healy sat with two judges not originally assigned, to enter a judgment in violation of Court Rules.

The irregular opinion filed by Judge Healy on March 1, 1944, exhibits a disregard of the identical documents which he approved as a part of the record by the order entered on March 25, 1943. (R. 1953.)

Scope of appeal. (Page xii.)

This appeal includes review of an order denying a motion to vacate. Where the action of a District Court is arbitrary, or in excess of its discretion, or where there is a failure to exercise discretion—appellate review will extend to such ruling.[11]

---

[11]Notice of appeal specifies judgment and also order denying motion to vacate. (R. 746.) Appeal sustained by: *Mattox v. United States*, 146 U.S. 140, 147; *Stetson v. Stindt*, 279 Fed. 209; *Ogden v. United States*, 112 Fed. 523 at 525; *Dwyer v. United States*, 170 Fed. 160; *Paine v. St. Paul Union Stock Yards Co.*, 35 Fed. (2d) 624.

There was no merit in the bank's objection to use of narrative statements taken from depositions. The originals were on file and could be examined on request. The witnesses were parties whom petitioners could cross-examine. The testimony could be used even though the witnesses refused to sign. (Rule 26(d) sub. 1 FRCP.) The transcript of that testimony was subject to the jurisdiction of the Court. The notary was bound to certify and return such record on request. (Rule 30 FRCP.) This was the procedure followed. All depositions were duly authenticated and on file before presentation of our motion to vacate.[12]

The bank refused to permit us to open these depositions. It was not interested in inspecting their contents. Its only interest consisted in arguing about the fact that the depositions had not been opened.

Under Rule 75(c) FRCP, narrative statements were permitted. The bank waived its right to insist on printing of the entire record. In view of its conduct, the bank is estopped from maintaining any objection to that record at this time.

Standards Required for Approval of Settlement.

The bank's case was not even sufficient on motion for nonsuit. This is clear from the failure of counsel to establish the following:

---

[12]Mortimer Fleishhacker (R. 775); Herbert Fleishhacker (R. 791 at 843, 844); Frank Moss (R. 875 at 879); Walter E. Buck. (R. 887 at 894.) Counsel were given opportunity to cross-examine before transcripts were completed. See statement in Herbert Fleishhacker deposition at R. 843.

Damages. Neither the opinion nor the evidence tendered by the bank is sufficient to disclose the amount of the loss.[13]

Extent of Liability. There was no proof of the extent to which directors were involved. The bank acted through counsel who were under disqualification. It pretended that its directors were not responsible.

Financial Responsibility. We tendered proof in July 1941. (R. 1476-1477.) The Court reserved our right to make that showing. (R. 1447.)

Settlement Negotiations. The bank made no disclosure regarding its conduct in handling the settlement. In view of its fiduciary relation—the bank and its counsel were bound to make a frank and complete statement in the District Court. If no greater amount could be obtained—the Court was entitled to the reasons supporting that conclusion.

The District Court had no power to enter a decree under Rule 23(c) FRCP, without maintaining the proper standards. We cite:

Case v. Los Angeles Lumber Products Co., 308 U.S. 106;

National Surety Co. v. Coriell, 289 U.S. 426;

SEC v. United States Realty, 310 U.S. 434;

---

[13]Ernest Bergest, a bank employee, produced some ledger cards in response to subpoena. He said these were so complicated that he could not understand them without detailed study. (R. 1273-1274; 1407.) These contained no proof of loans of any directors except defendants Shoup, McKinstry and Tilden. There was no evidence bearing on the other accounts set up in the amended objections filed May 20, 1942. (R. 405-406.) Ledger cards of Empire Farms were insufficient to show loss even in that case because other bank records were needed to determine offsets.

Consolidated Rock Products Co. v. DuBois, 312 U.S. 510;
Kelley v. Everglades Dist., 319 U.S. 415;
Cohen v. Young, 127 Fed. (2d) 721.

Regardless of the action taken on nonsuit motion, petitioners were entitled to a hearing on their objections. These objections frame issues within the scope of those cases, viz.:

1. The exact amount of damage sustained on the claims joined in suit. (Offers Nos. 13, 14; R. 513-516.)

2. Nature and extent of directors' liability—persons involved. (Offer No. 3; R. 490; Offer No. 2; R. 484.)[14]

3. Documentary proof available to support charges.[15]

4. Compulsory investigation into conduct of persons handling the negotiation. (Offers Nos. 20, 24; R. 522, 528.)

5. Amount collectible on a negotiation handled by independent counsel. (Offer No. 24; R. 528.)

6. Reasons for failure to employ independent persons to act on behalf of shareholders. (Offer No. 20; R. 522 at 524.)

7. Financial responsibility of persons to be released by settlement. (Offer No. 19; R. 521.)

---

[14]The decisions recognize absolute liability of directors where guilty of abdication of duty. See *Thomas v. Taylor,* 224 U.S. 73 at 82; *Jones National Bank v. Yates,* 240 U.S. 541 at 555; *Goess v. Ehret,* 85 Fed. (2d) 109 at 110; *Federal Deposit Insurance Corp. v. Mason,* 115 Fed. (2d) 548 at 550; *Michelsen v. Penney,* 135 Fed. (2d) 409 at 418-419.

[15]In case at bar, the directors' minute book and correspondence in bank files established a case of liability, against which a defense would be impossible. (R. 365, 507.)

Conclusions.

The record contains nothing except the bank's case on the petition.

That case is insufficient even on motion for nonsuit.

A trial on objections was demanded and denied.

The record is conclusive. It calls for a hearing on these objections conducted in accordance with the Fifth Amendment.

Counsel Fees.

The following statement appears at pages 8-10 of the brief of respondents R. Stanley Dollar and Mortimer Fleishhacker:

> ". . . petitioners say that the plaintiff can act as a dog in the manger and, at his whim or caprice, block a settlement which the Court, after full hearing, concludes to be in the interest of the corporation. . . . It is not surprising that the trial judge in his opinion stated that 'the actions of Mr. Sargent in relation to a settlement of the litigation and the securing for himself of attorney's fees and expenses were without the knowledge and sanction of the Court.' "

By objecting to a settlement, we have sought only a full hearing—a complete investigation—and a recognition of the standards required in Chandler Act cases. We have approached this problem with a complete disclosure of our conduct in this case. More than three years ago, Mr. Denicke offered to cooperate with any group in a position to act impartially. This offer is contained in a letter presented to William H. Thomson, the President, on May 28, 1941. We quote therefrom:

> "In discussions with you there was reference to allowance for services and expenses in connection with this litigation. A form of contract was submitted under which I would be willing to adjust this amount in a manner which will result in savings to both parties. At such time as may be appropriate I am prepared to discuss what is proper in regard to this. If it is not possible to arrive at an agreement, I will present the matter to the court and ask for an appropriate order. That subject should be taken up after we have determined upon the amount to be paid the bank and have made collection." (R. 1651 at 1666.)

The District Court has control of all allowances in a stockholders' suit. (Rule 23(c) FRCP.) An order in such cases is made out of the proceeds of a settlement. The amount is fixed by Court order.

It was the bank and not petitioners who raised this question. Thomson asked for a statement. (R. 1107.) He subsequently requested presentation of the contract mentioned in the District Court. The services described therein were not limited to this action. There were six independent suits. Substantial services were rendered in each. (R. 1089.) Without a detailed review of relevant facts it is impossible to determine the allowance which would be proper. We are not enlarging on that question because it has no bearing on the matters before this Court.

In the Supreme Court

OF THE

United States

Supreme Court, U.
FILED
NOV 3 1944
CHARLES ELMORE CROPLE
CLERK

OCTOBER TERM, 1944

No. 155

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a national banking association), MORTIMER FLEISHHACKER, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, JR., GEORGE I. COCHRAN, PHILIP S. BAKER, R. D. BRIGHAM, WALTER E. BUCK, WALTER A. HAAS, PAUL E. HOOVER, WILLIAM F. HUMPHREY, SAMUEL KAHN, VICTOR KLINKER, WILLIAM B. REIS, PAUL SHOUP, LEON SLOSS, JR., LOUIS SUTTER, ALFRED B. SWINERTON, T. C. TILDEN, JOSEPH O. TOBIN, WILLARD O. WAYMAN, IRENE L. BERG, Executrix of the Will of William H. Berg, Deceased, R. STANLEY DOLLAR and FRANK MOSS,
Respondents.

PETITION FOR REHEARING AND FOR RELIEF UNDER JUDICIAL CODE SECTION 240.

AARON M. SARGENT,
Hobart Building, San Francisco 4, California,
Attorney for Petitioners.

Table of Contents

	Pages
Petition for rehearing	2
First ground—relief from void entries	2
Second ground—summary order requiring Circuit Court to pronounce judgment	3
Third ground—summary order directing further proceedings in District Court	4
Fourth ground—issuance of writ—argument and decision in the Supreme Court	5
Fifth ground—arbitrary denial of writ—failure to exercise discretion	6
Grounds of certiorari requiring review as of right	7
Important questions requiring writ in exercise of "sound judicial discretion"	8
No man's land resulting from joint refusal of this Court and Circuit Court	10
Nature of judicial power	11
Certificate of counsel	12
Exhibit "A"—misconduct	13
Gross irregularities in Circuit Court	13-18
Deliberate violation of duty	19-21

Table of Authorities Cited

Cases

	Pages
Case v. Los Angeles Lumber Products Co., 308 US 106	4, 8
Cohen v. Young, 127 Fed. 2d 721	4, 8, 17
Cohens v. Virginia, 19 US (6 Wheat.) 264 at 403	11, 18
Consolidated Rock Products Co. v. DuBois, 312 US 510	4, 8
Delaware & Hudson Co. v. Albany & Susquehanna RR Co., 213 US 435	9
Doctor v. Harrington, 196 US 579	9
Federal Housing Administration v. Burr, 309 US 242	10
Federal Land Bank v. Priddy, 295 US 229	10
Interstate Circuit Inc. v. United States, 304 US 55	5
Keifer & Keifer v. Reconstruction Finance Corp., 306 US 381	9
Mayo v. Canning Co., 309 US 310	5
People v. Ruef, 14 Cal. App. 576, 620-632	20
Pepper v. Litton, 308 US 295	9
Public Service Comm. v. Wisconsin Tel. Co., 289 US 67	5
Reconstruction Finance Corp. v. Menihan Corp., 312 US 81	9

Statutes

Judiciary Act of Feb. 13, 1925 (Chapt. 229, 43 Stat. 936)	6
Judicial Code:	
Section 128	3, 6
Section 239	19
Section 240	2, 4, 5, 6, 7, 12
28 USCA 346	19
28 USCA 723(b)	7
United States Constitution:	
Article III Sec. 1	11
Amendment V	6

Rules

Circuit Court:	
Rule 3	3, 13, 16
Rule 4 subs. 1, 2	15
Federal Rules of Civil Procedure:	
Rule 23(c)	8
Rule 52	4, 7
Supreme Court Rule 38	2, 4

In the Supreme Court
OF THE
United States

October Term, 1944

No. 155

Ernest H. Denicke and Mary E. Doble,
Petitioners,

vs.

The Anglo California National Bank of San Francisco (a national banking association), Mortimer Fleishhacker, Herbert Fleishhacker, Mortimer Fleishhacker, Jr., George I. Cochran, Philip S. Baker, R. D. Brigham, Walter E. Buck, Walter A. Haas, Paul E. Hoover, William F. Humphrey, Samuel Kahn, Victor Klinker, William B. Reis, Paul Shoup, Leon Sloss, Jr., Louis Sutter, Alfred B. Swinerton, T. C. Tilden, Joseph O. Tobin, Willard O. Wayman, Irene L. Berg, Executrix of the will of William H. Berg, Deceased, R. Stanley Dollar and Frank Moss,
Respondents.

PETITION FOR REHEARING AND FOR RELIEF UNDER JUDICIAL CODE SECTION 240.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Owen J. Roberts, Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson, and Wiley Rutledge, Associate Justices of the Supreme Court of the United States:

Ernest H. Denicke and Mary E. Doble, the petitioners above named, hereby apply to this Court for a rehearing and reconsideration of the order entered October 9, 1944 denying petition for writ of certiorari.

First ground—Application for summary orders to vacate void entries in Circuit Court.

Petitioners apply for summary relief available by memorandum opinion, order or summary process of this Court under Rule 38 and under Section 240 of the Judicial Code, to compel the Circuit Court of Appeals for the Ninth Circuit to vacate the following proceedings of record in said Court in case No. 10,329, viz.:

1. Typewritten opinion bearing sole signature of Circuit Judge, William Healy, filed March 1, 1944 during adjournment of Court.

2. Minute entry of Clerk made on March 1, 1944 and entitled "Order Directing Filing of Opinion and Filing and Recording of Decree." (R. 1995.)

3. Unsigned printed form of "Decree" filed by Clerk on March 1, 1944 during adjournment.

4. Minute entry containing copy of such "Decree". (R. 2004.)

Reason: These entries are void for violation of CCA Rule 3.

Second ground—Application for summary orders to compel Circuit Court to pronounce judgment and render opinion on questions submitted in support of appeal.

Petitioners also apply for a summary order of this Court requiring said Circuit Court to perform the following duties required to effect an adequate appellate review of this cause in pursuance of Section 128 of the Judicial Code, viz.:

(a) To grant a hearing of said cause in bank.

(b) To render a decision according to law determining the following question affecting the validity of the judgment under review in said proceeding:

1. Whether the District Court granted petitioners a Constitutional trial on their objections (R. 333, 340, and 403) under the terms of the minute entries made by said Court which appear at R. 392, 398-399, 399, 402, 429 and 438).
2. Whether petitioners were entitled to set aside the judgment of District Court on the ground of mistake, because of reliance upon the terms of said minute entries.
3. Whether the District Court acted arbitrarily, or in excess of its discretion, or failed to exercise any discretion in denying the motion to vacate and other applications for relief described in the order at R. 737-739 made by said Court on August 17, 1942.

(c) To evidence such decision by an opinion in writing bearing signatures of a majority of the judges acting and filed in compliance with Rule III of said Circuit Court, such opinion to indicate the action taken by such Court

on each question affecting the validity of the judgment under attack.

(d) To enter a lawful judgment in accordance with an opinion so prepared and filed.

Reason: There has been a total failure to discharge that responsibility.

Third ground—Summary action under Rule 38, Sub. 5(b) and Judicial Code, Sec. 240—mandate for reversal with further proceedings in accordance with precedent.

The judgment is void on its face. This Court can recognize that error and direct remand for further proceedings.

A summary order should issue, after notice, to compel the following action in accordance with law:

1. Reversal of judgment entered by District Court. (R. 458.)
2. Instructions to vacate the minute order entered August 17, 1942. (R. 737.)
3. Granting of full hearing under objections now on file. (R. 333, 340, 403.)
4. Conduct of such hearing in accordance with principles expressed in *Cohen v. Young,* 127 Fed. 2d 721.
5. Application of standards expressed in *Case v. Los Angeles Lumber Products Co.,* 308 US 106, and in *Consolidated Rock Products Co. v. DuBois,* 312 US 510, to such hearing.
6. Making of special findings under Rule 52 FRCP after conclusion of such hearing—same to conform

to principles expressed in *Interstate Circuit Inc. v. United States,* 304 US 55; *Mayo v. Canning Co.,* 309 US 310; and *Public Service Comm. v. Wisconsin Telephone Co.,* 289 US 67.

7. Entry of a judgment in accordance with law based upon findings so prepared and filed.

Under Section 240 of the Judicial Code, we apply for summary relief, and for issuance of a mandate to that effect.

The Circuit Court is involved in irregularity and misconduct of such character as to render futile, a remand or further proceedings in that Court. A statement of that misconduct is attached hereto as Exhibit "A". We apply for a mandate running directly to the District Court, on the ground that such action is necessary to guarantee due process of law.

Fourth ground—Application for reconsideration and for order granting a writ and providing for argument and decision in this Court.

Under the preceding headings, petitioners have applied for every form of relief available to them by way of summary action to compel performance of the duties imposed by law upon the Circuit Court of Appeals for the Ninth Circuit. In the alternative, they have sought a mandate running directly to the District Court.

We present herewith, a petition for writ of mandamus, with motion for leave to file. That application is intended to cover any form of summary relief which this Court may deem beyond its power on issuance of a writ of certiorari.

If this Court shall determine not to grant a summary writ or allow application for writ of mandamus, it will then become necessary to provide for a review and decision in this Court. That relief would lie as a matter of right:

1. The Judiciary Act of February 13, 1925 (Chapt. 229, 43 Stat. 936) guarantees an absolute right of appellate review to every litigant who may file an action in a District Court of the United States.

2. There has been an unconstitutional denial of that right by the Circuit Court of Appeals for the Ninth Circuit. That denial amounts to a violation of the Fifth Amendment.

3. Our appeal is still tied up in a hopeless mass of irregularities committed by that Court. There is a deadlock. It cannot be broken without issuance of process by this Court.

4. A failure to break up that condition will leave petitioners without the benefit of an appeal guaranteed to them by Section 128 of the Judicial Code.

5. Under those conditions, this Court must treat the case as creating an absolute right to review and decision on certiorari. A writ for that purpose must issue, as of right, under Section 240 of the Judicial Code.

Fifth ground—Arbitrary denial of writ.

This Court has misinterpreted the Judiciary Act of 1925. It has assumed the existence of a power of arbitrary selection. It has applied that concept of the law in denying a writ. This conclusion is wholly at variance with that

statute. It cannot be reconciled with the testimony in committee nor with the Congressional debates. These proceedings explain the purpose of certiorari jurisdiction. They define the nature and extent of the power conferred on this Court by the Act of February 13, 1925. We present herewith a consolidated brief which includes analysis of that problem.

It is plain that this Court has not exercised a "sound judicial discretion", or in fact *any discretion* in denying a writ. In seeking relief under Section 240 of the Judicial Code, the following grounds were specified:

1. Gross irregularities in the Circuit Court—relief therefrom being a matter of right.

2. Denial of procedural due process in the District Court, and a sanctioning of that denial by the Circuit Court. This denial of fundamental right was shown by a judgment entered without trial at a time when minute orders of the District Court had continued the matter for a further hearing. Relief from that situation was a matter of right.

3. Jurisdiction invoked to enforce federal law. We demanded adequate findings under Rule 52 FRCP. That rule was adopted under 28 USCA 723(b)—a federal law. By decisions of this Court, compliance with that rule is mandatory. Violation thereof requires a reversal. These decisions are recognized as precedents. The jurisdiction of this Court was invoked to enforce compliance. Relief from that situation was a matter of right.

4. Conflict with Sixth Circuit. We show irreconcilable conflict between the result of this case and the decision in Cohen v. Young, 127 Fed. 2d 721, rendered in the Sixth Circuit. The existence of that conflict was fraudulently concealed by an opinion which carefully omits citation or discussion of that ruling. We have shown that this conflict was real and substantial—that it involved a question of federal law. Relief in such a case is a matter of right.

5. Breakdown in Circuit Court. We show that such Court refused to decide the questions submitted in support of our appeal. Relief from that condition is a matter of right.

In addition, our case involves questions whose importance cannot be doubted. If the Circuit Court had decided them, their importance would still require a writ. This Court could not exercise a sound judicial discretion and fail to recognize the great public importance of the following questions which are propounded:

(a) Standards required of a District Court in approving settlement of a shareholder's action under Rule 23(c) FRCP.

(b) Application of the rules of "fair and equitable conduct" announced by this Court in *Case v. Los Angeles Lumber Products Co.*, 308 US 106; *Consolidated Rock Products Co. v. DuBois*, 213 US 510, and other Chandler Act cases, to that situation.

(c) Derivative status. Nature and extent of the right of petitioners to manage and control the litigation,

in a corporation where the majority stock is held by the Reconstruction Finance Corporation.

(d) Right to litigate the conduct of a management appointed by that Agency, where such conduct is put in issue by pleadings duly filed.

(e) Right to carry on derivative status as against such a management and to apply to that problem the principles announced by this Court in *Delaware & Hudson Co. v. Albany & Susquehanna RR Co.*, 213 US 435, and in *Doctor v. Harrington*, 196 US 579.

(f) Right to litigate the good faith of such management under the rule announced by this Court in *Pepper v. Litton*, 308 US 295.

(g) Right to maintain cross-examination and discovery against officers and directors of the Reconstruction Finance Corporation concerning matters which are the subject of suit.

(h) Nature and extent of any privilege which could be claimed by such witnesses to justify refusal to give testimony or exhibit material documents.

(i) Nature and extent of the power conferred by Congress upon the Reconstruction Finance Corporation under 15 USCA 604.

(j) Further definition of the legal status and responsibility of the officers and directors of RFC, in view of the following decisions of this Court:

RFC v. Menihan Corp., 312 US 81;

Keifer & Keifer v. RFC, 306 US 381;

Federal Housing Adm. v. Burr, 309 US 242;
Federal Land Bank v. Priddy, 295 US 229.

(k) Right to maintain discovery against officers of Federal Reserve and Federal Deposit Insurance Corporation concerning matters within scope of the litigation.

(l) Right to conduct such examination against the Chief National Bank Examiner and to ascertain from him the nature and description of documents which might be within the scope of a *subpoena duces tecum.*

(m) Right to issuance of such a subpoena in view of the principles announced by Chief Justice Marshall in *United States v. Burr.*

There is a further question which transcends all others in importance. This calls for analysis of the Judicial Process. We come here with a case which the Circuit Court has refused to decide. We have sought a writ and a decision in this Court under Section 240 of the Judicial Code. That application has been denied.

There are two federal courts, each with power to act. Both have refused. Between the rulings of these courts, we find a no-man's land into which petitioners have been cast under circumstances amounting to a miscarriage of justice.

The judicial power has been treated as a *discretion.* Under the Constitution, its exercise is a *matter of right.* Any citizen may invoke that power:

> "*The Judicial Power* of the United States *shall be vested* in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." (Art. III, Sec. 1.)

There has been a violation of the *rule* announced by Chief Justice Marshall in *Cohens v. Virginia,* 19 US (6 Wheat.) 264 at 403:

> "The judiciary cannot, as the legislature may, avoid a measure. . . . We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it is brought before us. *We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.*"

Petitioners are citizens of the United States. They have exercised their right to invoke the jurisdiction of this Court. They resubmit the questions disclosed by the record and apply for relief upon each ground set forth herein.

Dated, San Francisco, California,
October 31, 1944.

AARON M. SARGENT,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the foregoing Petition for Rehearing and for Relief under Judicial Code, Section 240, is well founded; and that the same is presented in good faith and not for purposes of delay.

Dated, San Francisco, California,
October 31, 1944.

AARON M. SARGENT,
Attorney for Petitioners.

EXHIBIT "A"

MISCONDUCT.

Gross Irregularities in the Circuit Court.

Rule of Court.

". . . Appeals shall be deemed decided when announced from the bench in a session of the court at the place of the term in which they are submitted, or when the signed opinions or other documents evidencing their decision are filed with the Clerk.

Dated: Nov. 30, 1936

(Signed) Curtis D. Wilbur
Francis A. Garrecht
William Denman
Clifton Mathews
Bert Emory Haney."

(Endorsed)
Filed Nov. 30, 1936
Paul P. O'Brien, Clerk

Flagrant Violation of That Rule.

"OPINION.

"Before: **Mathews, Stephens,** and **Healy,** Circuit Judges.

"**Healy, C. J.**

"This appeal is from a judgment in a derivative suit. . . .

"**We** need not stop to inquire . . . the opinion already sufficiently indicates **our view.** . . . **We** find no merit in other points argued.

Affirmed.

William Healy,
United States Circuit **Judges.**"

False Entries During Adjournment.

The Clerk made an entry, by which he "authorized himself" to file that opinion:

> "ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDNG OF DECREE.
>
> "By direction of the Court, ordered that the typewritten opinion this day rendered by this Court in above cause *be forthwith filed by the clerk,* and that a decree be filed and recorded . . . in accordance with the opinion rendered." (R 1996.)

A fictitious "decree" was then *filed* and *recorded.* (R 2004.)

An unsigned printed form was *filed.*

This form was then *recorded* by recopying in the minute book.

Motion to Vacate.

Those entries were challenged for violation of Court Rules. (R 2005-2014.)

Denial by Judges Involved in Violation.

> *Judge Mathews:* "Rule 3, paragraph 5, is a rule made by this court for the guidance and protection of its clerk. Neither you nor your clients have any interest in enforcing that rule. *It isn't any of your business whether that is complied with, or not.*" (R 2058.)

Motion was denied by Judges *Mathews* and *Healy.* (R 2060.)

Application for Reassignment.

"Appellants . . . hereby apply for an order . . . pursuant to CCA Rule 4, sub. 2, directing that this cause be immediately reassigned for consideration by the entire court in bank; *that the petition for rehearing filed herewith be considered by the court in bank. . . .*" (R 2015.)

Instruction to Clerk.

"To Paul P. O'Brien, Clerk. . . .

". . . you are requested to present the attached Application for Reassignment to the Senior Circuit Judge for action on his part in accordance with CCA Rule 4, subs 1 and 2.

"*Appellants desire to make immediate application for such reassignment in order that the within Petition for Rehearing may receive consideration by the entire court in bank.*" (R 2014.)

Duty to Act.

That Application was in due form. The Clerk was the proper party to receive it. By law, and by Rule, the Court was bound to pass upon it. CCA Rule 4 provides:

"The calendars of the court shall be made up by the clerk *under the direction of the senior circuit judge subject to the approval of the majority of the judges.*

"The senior circuit judge *after conference* with the circuit judges shall designate and assign the judges who are to hear the causes placed upon the calendars of the court; *such designation or assignment may be modified or set aside by a majority of the judges.*"

Refusal to Act.

This Application was ignored.

There is no entry—no clue of any kind.

Not a fragment of evidence in the record to show what happened to it!

Petition for Rehearing in Bank.

This document is addressed:

"To the Honorable Curtis D. Wilbur, Senior Circuit Judge. . . .

"And to the Honorable Francis A. Garrecht, William Denman, Clifton Mathews, Albert Lee Stephens and William Healy, Circuit Judges. . . ." (R 2017.)

Refusal to Consider Petition in Bank.

Joint action could not be obtained. *Judges Mathews, Stephens and Healy sat alone to deny the petition.* (R 2061.)

Arbitrary Refusal to Grant Rehearing.

Glaring errors were specified:

1. Misconduct of Circuit Judge Healy resulting in false and void entries in violation of CCA Rule 3. (R 2061.)
2. Deliberately false statements of fact contained in the "Healy Opinion." (R 2019-2026; 2027-2030.)
3. Refusal to pronounce judgment upon the case as disclosed by the record. (R 2026.)
4. Refusal to order reversal because of judgment entered without trial. (R 2027.)

5. Violation of precedent, viz.: refusal to follow decisions of this Court, under which reversal was mandatory for lack of findings. (R 2030-2032.)

6. Refusal to cite, discuss, follow, or distinguish decision of Circuit Court of Appeals for the Sixth Circuit in *Cohen v. Young,* 127 Fed. 2d 721, or reconcile conflict between that case, and result of the decision in the case at bar. (R 2032-2033.)

7. Refusal to cite or follow decisions of California Supreme Court bearing on derivative right of appellants. (R 2033-2035.)

8. Further violation of precedent, viz.: refusal to cite, discuss, follow, or distinguish decision of this Court in *Delaware & Hudson Co. v. Albany & Susquehanna RR Co.,* 213 US 435, under which nonsuit of petition should have been granted. (R 2035-2039.)

9. Abuse of jurisdiction. Determination of alleged good faith of bank management—in advance of a trial of that issue. (R 2040.)

10. Refusal to determine the standards required for approval of a settlement under Rule 23c FRCP. (R 2041.)

11. Refusal to cite, discuss, follow or distinguish the principles announced by this Court in Chandler Act cases. (R 2043.)

12. Refusal to determine appellants' right to maintain discovery against persons involved in settlement negotiations. (R 2044.)

13. Refusal to determine appellants' right to examine into conduct of RFC, and officers thereof, in view of its status as majority shareholder. (R 2046.)

14. Abdication of duty in refusing to pronounce judgment on errors assigned in support of appeal. (R 2048.)

15. Refusal to follow precedent established by this Court in *Cohens v. Virginia,* 19 US (6 Wheat.) 264 at 403, under which the exercise of appellate jurisdiction is mandatory. (R 2051.)

That petition—specifying such irregularities—was passed on by the authors of the misconduct. *Circuit Judges Healy and Mathews sat to review their action in our case!*

A Breakdown in the Circuit Court.

There is no opinion—no judgment of the Circuit Court. A deadlock in that Court. A breakdown. *A deliberate and persistent refusal to act.*

MISCONDUCT.

Deliberate Violation of Duty.

The Circuit Court had the benefit of procedure which could have been employed to obtain the opinion of this Court upon any doubtful or important questions of law. We cite Judicial Code Sec. 239 (28 USCA 346):

> "*Certificates of questions by Circuit Courts of Appeals and Court of Appeals of District of Columbia.*
>
> "*In any case,* civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, the Court *at any time* may certify to the Supreme Court of the United States *any questions or propositions of law concerning which instructions are desired for the proper decision of the cause;* and thereupon the Supreme Court may either give binding instructions on the questions and propositions certified or may require that the entire record in the cause be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there by writ of error or appeal."

We requested that Court to decide the precise questions which are now the subject of a Petition for Writ of Certiorari. *It refused to decide—and it refused to certify.*

This duty could have been performed "at any time". The Court had power to certify questions *before judgment.* It had power to take this step *after judgment*—before passing on the Petition for Rehearing.

There has been a studied effort to avoid the exercise of jurisdiction. Circuit Judges Healy and Mathews took every step necessary to make their action void under the rule announced by the California Supreme Court in *People v. Ruef,* 14 Cal. App. 576, 620-632. We quote from that opinion:

> ". . . the joint action or concurrence of four justices is the thing required to constitute the action of the court, and . . . in contemplation of law, this joint action is taken when four justices have in writing declared their concurrence in a particular order or judgment with intent to make it an order or judgment." (14 Cal. App. p. 624.)
>
> ". . . it is clear that the concurrence of a justice in an order granting an application for a hearing in this court after decision and judgment by a district court of appeal, cannot lawfully be given while such justice is not within the state, and, as we understand the argument of learned counsel for defendant, it is not claimed that Justice Henshaw could have assisted or participated in any way in making the order effectual as an order of this court while he was absent from the state, had he not indicated his assent before leaving the state by subscribing his name thereto." (14 Cal. App. 628.)
>
> "We have seen that the concurrence of four justices is essential to the validity of an order of the character here under consideration. This necessarily implies a concurrence of four justices, qualified and with power to act at the very moment of action as a court. . . ." (14 Cal. App. 628-629.)

"The word 'concurrence', as used in this connection, means agreement or union in action and design. There must be such agreement or union on the part of at least four justices qualified to act to make such an order effectual as an order of this court, and the uniting therein on the part of each justice is an exercise by him of a judicial function." (14 Cal. App. 629.)

"When Justice Henshaw left the state, no other justice had joined with him in assenting to such order, and the assent theretofore given by him amounted to nothing more than an indication by him to his associates of his then willingness to concur with three or more of them in such proposed order. . . . It is undoubtedly true, and is the settled practice of this court, that any justice may withdraw his previously indicated assent to either decision or order at any time before the decision or order is actually made. It is likewise true that such previously indicated assent on the part of any justice to either decision or order is ineffectual for any purpose, if, pending the actual making of the decision or order, such justice dies, or, for any reason, ceases to be a member of this court." (14 Cal. App. 629-630.)

"It therefore follows that the purported order must be held to be void for want of concurrence therein of the necessary number of justices. Without such concurrence there could be no valid order, and it becomes the duty of the court to strike the void order from its records." (14 Cal. App. 631.)

In the Supreme Court
OF THE
United States

Office - Supreme Court
FILED
NOV 3 19
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1944

ERNEST H. DENICKE and MARY E. DOBLE, *Petitioners,* vs. THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, et al., *Respondents.*	No. 155
ERNEST H. DENICKE, *Petitioner,* vs. R. D. BRIGHAM, et al., *Respondents.*	No. 196
MARY E. DOBLE, *Petitioner,* vs. WALTER E. BUCK, et al., *Respondents.*	No. 197

CONSOLIDATED BRIEF IN SUPPORT OF PETITIONS FOR REHEARING, AND FOR SUMMARY RELIEF UNDER JUDICIAL CODE SECTION 240.

AARON M. SARGENT,
Hobart Building, San Francisco, 4, California,
Attorney for Petitioners.

WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Table of Contents

	Page
Statement of questions involved	2
Judicial power	2
Power to invoke processes of Supreme Court	4
Scope of certiorari jurisdiction	5
Duty of court on certiorari	5
Mandatory review	6-8
Denial of procedural due process	6
Enforcement of federal law	6
Conflicts between Circuits	7
Compliance with precedent	7
Miscarriage of justice in Circuit Court	8
Power of supervision	9
Process for supervision	9
Practice adopted in Anderson v. Atherton (Oct. Term 1936—No. 803)	10
Limited grant of certiorari	11
Power and duty to act	11

Appendix.

History of Jurisdictional Act of 1925	i
Authorship of bill	i
Sponsorship in Congress	ii
Purpose of bill as explained in Senate committee	ii
Debate in Senate	iii
Letter of Chief Justice Taft explaining Supreme Court bill	v
Primary responsibility resting in the Circuit Courts	vi
Ultimate responsibility resting in Supreme Court	vi
Other representations made to Congress to procure enactment of judiciary amendments	vii
Absolute right of review in cases presenting conflicts between Circuits	ix

Page

Standards governing action of the Supreme Court..... ix

Probable cause justifying issuance of a writ..... x

Definite understanding for the record..... x

Proceedings before Congress in 1935..... xi

Statement of Chief Justice Hughes in opposition to S. 2176 providing for enlargement of Supreme Court jurisdiction xi

Statement of Justice Van Devanter..... xiii

Congressional action in 1937..... xiv

Letter of Chief Justice Hughes to Senator Wheeler on March 21, 1937, explaining purpose and operation of certiorari jurisdiction xiv

Table of Authorities Cited

Cases	Pages
Anderson v. Atherton, 300 US 652	10
Anderson v. Atherton, 302 US 643	10
Atherton v. Anderson, 86 Fed. 2d 518	10
Cohens v. Virginia, 19 US (6 Wheat.) 264 at 403	3
Mahnich v. Southern Steamship Co. (Oct. Term 1943—No. 200)	8

Statutes

Constitution of the United States:	
Article III, Sec. 1	2, 3, 7
Article III, Sec. 2	3
Article VI	6, 7
Amendment V	9
Act of February 13, 1925 (43 Stat. 936)	8, i, ii
Judicial Code:	
Sec. 128	8
Sec. 240	5, 9, 11
28 USCA 225	8

Rules

Supreme Court:	
Rule 7, sub. 5	11
266 US 681 establishing Rule 38	8
Rule 38	11

Miscellaneous

Jurisdiction of the Supreme Court of the United States by Robertson & Kirkham, pages 556-557	10
Jurisdictional Act of 1925:	
Report of House Committee on HR. 8206—68th Congress, 2d Session	4, 6, i, viii

Pages

Report of Senate Judiciary Committee on S. 2060—68th Congress .....i, iii, vi, x

Report of Supreme Court Committee appointed to draft judiciary amendments 5

Senate debates on Act of February 1925.....7, iii, iv, vi, ix

Senate Bill 3176 (74th Congress—1st Session) providing direct Supreme Court review of injunctions restraining enforcement of Federal laws..... xi

Hearing before Senate Judiciary Committee on S. 2176 (74th Congress—1st Session) .....5, xiii

Senate Bill 1392 (75th Congress—1st Session) proposing reorganization of the judiciary..... xiv

Hearing before Senate Judiciary Committee on S. 1392 (75th Congress—1st Session) xiv

Report of Senate Judiciary Committee on S. 1392 (75th Congress—1st Session) xvii

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

ERNEST H. DENICKE and MARY E. DOBLE, *Petitioners,* vs. THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, et al., *Respondents.*	No. 155
ERNEST H. DENICKE, *Petitioner,* vs. R. D. BRIGHAM, et al., *Respondents.*	No. 196
MARY E. DOBLE, *Petitioner,* vs. WALTER E. BUCK, et al., *Respondents.*	No. 197

CONSOLIDATED BRIEF IN SUPPORT OF PETITIONS FOR REHEARING, AND FOR SUMMARY RELIEF UNDER JUDICIAL CODE SECTION 240.

We address ourselves to the following questions:

1. *Judicial Power.* The nature and extent of the power conferred on this Court by the Constitution of the United States.

2. *Rights on Certiorari.* The right of a litigant to invoke that jurisdiction under Section 240 of the Judicial Code.

3. *Duty on Certiorari.* Nature of the duty imposed on this Court on the filing of such an application—principles governing its exercise.

4. *Mandatory Review.* Determination of those cases wherein review lies as a matter of right.

5. *"Discretionary Review".* Cases where this Court has a "discretionary power" to grant "further review", *after review and decision in a Circuit Court of Appeals.*

Judicial Power.

This Court is a Constitutional Court. Its power is derived from Article III Section 1 of the Federal Constitution:

> "The judicial Power of the United States, *shall be vested* in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

The framers of our Constitution defined that "judicial power". They did not limit its exercise. It was not made the subject of a "discretion". It was absolute in form. It was conferred with intent that it be employed in every case.

"The judicial Power *shall extend to all Cases,* in Law and Equity, *arising under this Constitution, the Laws* of the United States, and Treaties made. . . ." (Article III Sec. 1.)

This Court was given original jurisdiction,

"In all Cases affecting Ambassadors, other public Ministers and Consuls. . . ." (Art. III Sec. 2.)

It was given appellate jurisdiction "in all other cases". (Article III Sec. 2.)

These clauses in our charter were expounded by Chief Justice Marshall in February Term 1821:

"It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the Constitution. . . . *We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.* . . . We find this tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception to this grant, and we cannot insert one." (*Cohens v. Virginia,* 19 US (6 Wheat.) 264 at 403.)

There is no difference, in principle, between the exercise of that power on certiorari—and the action of this Court on appeal. The distinction, if there be one, is limited to the rules governing its exercise.

Power to Invoke.

The processes of this Court are invoked by the filing of a petition for certiorari. When such application is made, a litigant becomes entitled to the exercise of a "sound judicial discretion", in relation to any matters which Congress has confided to the "discretion" of this Court.

He becomes entitled, as of right, to a writ in those cases where Congress has not made relief subject to any discretionary power.

> "While the authority of the Supreme Court to take cases on petition for certiorari is spoken of as a discretionary jurisdiction, this does not mean that the Court is authorized merely to exercise a will in the matter, but rather that the petition is to be granted or denied according to a sound judicial discretion."[1]

This rule is impartially applied:

> "Under the Jurisdictional Act of 1925 there are only a limited number of cases in which the right of appeal to the Supreme Court is allowed, and the Court determines on application for certiorari what cases should be brought before the court. That is a very important exercise of authority, and there is nothing that we do to which we give greater attention
>
> . . .
>
> "The principles are quite obvious. Cases should not go to the Supreme Court of the United States simply because of the amount of money involved, or *because of the character or prominence of the parties, or because of the counsel.* The question before the Supreme Court is, manifestly, the importance of the

[1]Testimony of Justice Van Devanter before House Judiciary Committee on HR 8206—68 Congress Second Session—Report No. 1075, pp. 2-3.

question of law involved, the importance of an authoritative determination by the tribunal invested with that very important function. We consider these various applications with respect to that, *not as to the parties*, not as to the amount of money involved, *not as to counsel, but as to the law.*"[2]

Scope of Jurisdiction.

Congress did not intend this Court to become a court for the trial of government litigation. The jurisdiction was not limited to cases where the federal government, or an agency thereof sought to invoke the jurisdiction:

> "*In any case,* civil or criminal, in a Circuit Court of Appeals . . . it shall be competent for the Supreme Court of the United States, *upon the petition of any party thereto, whether Government or other litigant,* to require . . . . that the cause be certified. . . ." (Judicial Code Sec. 240.)[3]

Duty on Certiorari.

There is no arbitrary power of selection:

> "While the authority of the Supreme Court to take cases on petition for certiorari is spoken of as a discretionary jurisdiction, this does not mean that the Court is authorized merely to exercise a will in the

---

[2]Testimony of Chief Justice Hughes on Mar. 25, 1935, before Senate Judiciary Committee of 74th Congress First Session, on Senate Bill 2176, pp. 6-7.

[3]See page 11 of Report of Supreme Court Committee on Judiciary Amendments which contains the following comment:

> "The words 'whether government or other litigant', were inserted to lay at rest a doubt which appears to prevail in some quarters as to the right, under the existing law, to issue a certiorari upon petition of the government in a criminal case."

matter but rather that the petition is to be granted or denied according to a sound judicial discretion".[4]

Mandatory Review.

1. Denial of procedural due process.

No federal court has the power or constitutional right to enter a judgment without trial. No court created under our federal Constitution has the right to sanction a decree entered in that manner. Where that principle is violated, relief on certiorari is a matter of right.

2. Enforcement of Federal Law.

That responsibility is imposed by the Constitution of the United States:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the *supreme Law of the Land. . . .*" (Article VI.)

We have ten Circuit Courts of Appeals—more than forty-eight District Courts. Unless there is one law,—and a uniform enforcement of that law,—we have a condition that will approach judicial anarchy.

These Courts are bound to enforce the federal law on application of any party.

There are ten circuits. The Court established in each circuit is bound by that responsibility.

This Court is bound by the Constitution of the United States.

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior

---

[4]Testimony of Justice Van Devanter before House Judiciary Committee—Report No. 1075 on HR 8206—68th Congress 2d Session at page 3.

Courts as the Congress may from time to time ordain and establish." (Article III Sec. 1.)

". . . all executive and judicial Officers, both of the United States and of the several states, shall be bound by Oath or Affirmation, to support this Constitution." (Article VI.)

3. Conflicts between Circuits.

Where ten circuits and forty-eight or more federal districts persist in declaring or enforcing diametrically opposite interpretations of federal law—that law ceases to be the "supreme law of the land". In cases presenting a conflict, issuance of a writ becomes a matter of Constitutional right.

". . . it is the invariable practice of the Supreme Court, in cases which have been differently decided by Circuit Courts of Appeals to allow a writ of certiorari. The effort is to bring the law of the United States into uniformity."[5]

4. Duty to Compel Decision in Accordance with Precedent.

Where this Court has decided a question of federal law, its determination becomes binding, as a pronouncement on the meaning of the federal statute or Constitutional provision interpreted. *Any litigant has power to enforce compliance.*

This principle goes further than any concept of *stare decisis.* It concerns the power and authority of a Supreme Court over tribunals of inferior jurisdiction. We cite the dissenting opinion of Justices Roberts and Frank-

[5]Statement of Senator Cummins made Jan. 31, 1925, in debate on S2060—68th Congress First Session; Vol. 66 Congressional Record at p. 2754.

furter in *Mahnich v. Southern Steamship Co.* (Oct. Term 1943 No. 200):

> ". . . the court below naturally felt bound to follow and apply the law as clearly announced by this Court. If litigants and lower federal courts are not to do so, the law becomes not a chart to govern conduct but a game of chance; instead of settling rights and liabilities it unsettles them. Counsel and parties will bring and prosecute actions in the teeth of the decisions that such actions are not maintainable on the not improbable chance that the asserted rule will be thrown overboard. . . . But the more deplorable consequence will inevitably be that the administration of justice will fall into disrepute. Respect for tribunals must fall when the bar and the public come to understand that nothing has been said in prior adjudication has force in a current controversy."

5. Breakdown in Circuit Court.

All litigants were granted an appeal as of right in the Circuit Court. The Judiciary Act of 1925 so provides.

> "The Circuit Courts of Appeals *shall have appellate jurisdiction . . . in all cases* save where a direct review of the decision may be had in the Supreme Court. . . ." (Judicial Code Sec. 128, 28 USCA 225.)

That jurisdiction is mandatory. Congress was unwilling to confer a limited jurisdiction on this Court, without an express understanding to that effect.

This Court recognized its legal and moral responsibility. Its Rules of Practice were amended on July 1, 1925, to provide for issuance of a writ,

> *"Where a circuit court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision."* (266 US 681.)

Power of Supervision.

This Court has, without doubt, full power to supervise and control the conduct of any lower federal court. Where such Court has wilfully failed to discharge the responsibility imposed by Congress, there can be no question concerning the power to grant relief. A contrary view would lead to absurdity.

This Court is a "Supreme Court". It is vested with the judicial power of the United States. As such it has control over such "inferior courts as the Congress may from time to time ordain and establish".

Every citizen is guaranteed due process in our lower federal courts. This means *procedural due process.* That right is secured by the Fifth Amendment.

Process for Supervision.

The power on certiorari, under Section 240 of the Judicial Code, is equal to any emergency. If a Circuit Court refuses to pronounce judgment, this Court has power to compel action. If such Court becomes involved in hopeless irregularity, this Court can find a way to clear the record. There is no power residing in a Circuit Court which can frustrate the action of this Court.

Our question is, manifestly, one of practice. There is no want of power—no doubt regarding the duty calling for its exercise.

The jurisdiction on certiorari includes authority to grant a writ on condition:

> "It is a common practice for the Supreme Court to grant petitions for certiorari limited to a particular or specified question. . . . Not only does the Court confine review to cases involving questions warranting consideration in the interests of jurisprudence and

> uniformity of decision, but to the particular questions in those cases which are deemed to be of that nature. The power of the Court so to limit the scope of its review in any case cannot be doubted."[6]

Where appropriate, this Court may dispose of a matter by memorandum opinion. It may instruct a Circuit Court to perform any duty which that Court has not discharged. We cite the practice followed in *Anderson v. Atherton,* 86 Fed. 2d 518 (Oct. Term 1936 No. 803).

This Court granted certiorari (300 US 652). Thereafter the Circuit Court was instructed to take further proceedings. We quote from the memorandum opinion at 302 US 643:

> "Per curiam: The Court is of the opinion that the Circuit Court of Appeals was in error in ruling that, in the absence of a cross appeal, the question whether common law liability for negligence would support the decree was not before the Court for review. . . . The decree of the Circuit Court of Appeals is reversed and the cause is remanded to that Court for the determination of that question."

We come here with cases that involve violations of precedent. This Court may deem it unnecessary to review or revise the decisions affected. It may treat the matter as appropriate for summary action.

This Court may act as on a motion to dismiss:

> "Although the Court upon consideration of a motion to dismiss or a motion to affirm may refuse to grant the motion, it may, if it concludes that the case is of such a character as not to justify extended argu-

---

[6]Jurisdiction of the Supreme Court of the United States—Robertson & Kirkham, pp. 556-557.

ment, order the cause transferred for hearing to the summary docket." (Rule 7, sub. 5.)

There is power to make a limited grant. This may be directed to specific questions—whether the Circuit Court has complied with precedent—whether the entries in that Court are valid—whether that Court has pronounced judgment on the questions propounded. Such a writ can be addressed to any matter within the power of supervision of this Court under Rule 38.

The procedure may be by order to show cause. It can be by any mode of practice which will give respondents a notice and a hearing before issuance of an order.

On reflection, this Court may deem it proper to grant full review. It may decide to receive full argument and render judgment as on direct appeal.

If that course is not followed, the enforcement of precedent becomes a matter of right.

We are unable to conceive of a condition under which this Court could be without power to act under Section 240 of the Judicial Code. We are equally unable to discover any ground that could justify a refusal to exercise such authority.

Dated, San Francisco, California,
October 31, 1944.

Respectfully submitted,
AARON M. SARGENT,
Attorney for Petitioners.

(Appendix Follows.)

Appendix

History of Jurisdictional Act of 1925.

The Act of February 13, 1925 (43 Stat. 936) is the basis of the present certiorari jurisdiction of this Court. We present herewith a legislative history of that Bill, obtained from Committee Reports and other documents in the files of Congress.

Authorship.

> "The matter in some way came to the attention of the Judiciary Committee of the Senate. The Chairman of that Committee communicated with the Chief Justice and requested the Court, members of the Court out of their experience, to prepare a bill which would meet the situation. The Court hesitated at first, but as a result of further conferences between the Chief Justice and the Chairman of the Judiciary Committee of the Senate, the Court appointed a Committee which drafted a bill, and submitted it to the full Court."[7]

Sponsorship.

> "After the Committee of the Supreme Court had gone over the subject they reported it to all the members of the Court, in conference, and the matter was gone over several times and the draft revised *until it came to represent the composite judgment of the members of the court* as to what would operate well for litigants and at the same time enable the court to discharge in an appropriate way the functions which rightly belong to it."[8]

---

[7]Testimony of Justice Van Devanter—Hearing before Committee on the Judiciary, House of Representatives—68th Congress, second session on H. R. 8206 December 18, 1924 at page 23.

[8]Testimony of Justice Van Devanter, Feb. 2, 1924 on Hearing before Sub-Committee of Committee on the Judiciary of United States Senate on S. 2060—68th Congress—at page 27.

Sponsorship in Congress.

The Bill—drafted by this Court—was introduced by Senator Cummins during the First Session of the 68th Congress as S. 2060. A copy was offered as H. R. 8206.

Justices Van Devanter, McReynolds and Sutherland testified before the Judiciary Committees of both Houses.

Chief Justice Taft acted as spokesman. His influence was behind the measure. His prestige assured enactment.

The measure which now appears as the Act of February 13, 1925 (26 Stat. 826, Chapt. 517) is H. R. number 8206 as amended by the Senate and confirmed in the House.

Purpose Explained in Senate Committee.

> *Justice Van Devanter:* "This Bill extends existing statutes so as to cover a larger number of cases. . . . It does away with the obligatory jurisdiction on appeal or writ of error, as to Circuit Court of Appeals cases, by providing that no case shall come from those Courts to the Supreme Court except on petition for certiorari."
>
> *Justice McReynolds:* "The theory being that after two trials in a Federal Court *as of right—one of the District Court and one in the Circuit Court of Appeals* —the matter should end, subject to a discretionary review in the Supreme Court for some superior reason."
>
> *Justice Van Devanter:* "That is true. No case comes into a Circuit Court of Appeals except it has passed already through the Trial Court, and when the Trial Court and the Circuit Court of Appeals *have both considered and decided it,* the Bill proceeds on the theory that the Supreme Court should not be required to review the case unless there be in it some question or matter of such importance as would cause

that Court in the exercise of a sound discretion to take the case".[9]

Debate in the Senate.

Senator Cummins stressed the basic right of every litigant—his absolute right to an appellate review—*and an appellate decision*—in *every case.*

> "It will be remembered that any case that reaches the Circuit Court of Appeals has already been tried in the District Court of the United States, *and when it is decided by the Circuit Court of Appeals* the litigant has had one trial in the District Court. He has had a second trial in the Circuit Court of Appeals".[10]

It was assumed that the Circuit Court would discharge its responsibility. The discussion centered upon the duty of this Court—*after decision in the Circuit Court.* The Senate was deeply concerned over a grant of discretionary power—even where limited to that situation:

> *Senator Reed:* "I think it is a Bill of such importance that it ought to have a full discussion on the floor. Speaking for myself, I want time really to study it. It is a very important Bill to be passed on lightly. With all the respect in the world for the Judges of the Supreme Court—and I entertain the very highest respect for them—I am not unmindful of the fact that it is our duty here to enact the statutes just as it is their duty to construe them. We must exercise our judgment."
>
> *Senator Cummins:* "With respect to the constitutional question, I only repeat that those who have

---

[9]Hearings before sub-committee of the Committee on the Judiciary—United States Senate, on S. 2060, 68th Congress, pages 28-29.

[10]Senate proceedings of January 31, 1925; Vol. 66, Congressional Record, page 2752.

confidence in the desire of the Supreme Court of the United States, to maintain a correct interpretation of the constitution, and not only to maintain a correct interpretation but to make that interpretation uniform or fairly uniform throughout the country, see no objection to making these reviews through the writ of certiorari instead of by appeal or writ of error."

Senator Walsh: "I desire to say that I feel a very keen interest in this measure, and I very much regret that I never had any opportunity to join in any consideration of it by the Committee on Judiciary. . . .

"I am . . . in harmony with the view expressed—that in those cases in which the jurisdiction of the Federal Courts is appealed to upon the ground of the existence of a Federal question, the right of appeal should end with the Circuit Court of Appeals except in so far as the Federal question is concerned. I think after a man has had a trial of a case on the merits of it in a District Court, in an equity case, for instance, *and then a trial on the merits of the case in the Circuit Court of Appeals,* a trial on the merits of a case in the Supreme Court of the United States is quite injustifiable. . . .

"Under a writ of error from a State Court . . . a review is not had upon the entire merits of the whole case, but there is a review simply of the Federal question involved. . . . I believe the same rule ought to prevail in respect to the cases that go to the Circuit Courts of Appeals. . . . *Mr. President, I find it difficult to yield to the idea that the Supreme Court of the United States ought to have the right in every case to say whether their jurisdiction shall be appealed to or not*".[11]

---

[11]Senate proceedings of January 31, 1925; Vol. 66, Congressional Record, pages 2755-6.

There was an adjournment to February 3, 1925 to permit further debate. In the meantime the Bill, as drawn by the Committee of this Court, was passed by the House (66 Cong. Rec. 2917).

Debate was resumed in the Senate. The following letter was presented:

Supreme Court of the United States,
Washington, D.C.

December 9, 1924.

My dear Senator Copeland:

For two years our Court has been very anxious to secure the passage of a Bill to give us greater power of certiorari, so as to reduce the number of cases which come to us. . . . We wish to put into one statute the grounds and method of appeal both to the Circuit Courts of Appeals and to us. Our court appointed a Committee that worked a full year on the subject and got together a Bill, and the court approved. It was introduced last session by Senator Cummins, and was recommended to the Senate by the Judiciary Committee. The Bill is opposed by Senator Thomas Walsh and Senator Shields on the ground that they do not believe in giving to our court greater jurisdiction in certiorari. They think it vests in us too much discretionary power. . . .

The theory of our system is a correct one, namely, that the District Court and the Circuit Courts of Appeals shall furnish all the hearings that any litigant should have, and that the business of the Supreme Court should be to consider and decide for the *benefit of the public* and for the benefit of *uniformity of decision* only questions of importance. The appeal to us should not be based on the right of a litigant to have a second appeal. We don't, of course, in hearing on application for certiorari decide the case

presented on the merits. We could not do that without a full hearing but it is entirely possible for us to determine the character of the question and the importance of our taking up the time of the court to hear and decide it. . . .

Sincerely yours,

Wm. H. Taft.[12]

Primary Responsibility in Circuit Courts.

". . . *litigants have, first, a trial in the District Court and then, by appeal or writ of error, a trial in the Circuit Court of Appeals—a court that ranks as high or higher than the Supreme Tribunals of the States.* It is our belief that here ordinary litigation should end and that the cases should not go to the Supreme Court of the United States unless the questions involved are of grave public concern or unless uncertainty attends the decision of the Circuit Court of Appeals by reason of conflict in the rulings of these Courts or the Courts of the States. *It is believed the right of the Circuit Courts, to certify questions to the Supreme Court and the right to file a petition for certiorari will furnish ample opportunity for all cases to go from the Circuit Court of Appeals to the Supreme Court which ought to be heard by the latter tribunal.*"[13]

Ultimate Responsibility in the Supreme Court.

Section 240 of the Judicial Code was amended by the Act of 1925 to read as follows:

"In *any case,* civil or criminal, in a Circuit Court of Appeals, . . . *it shall be competent* for the Su-

---

[12]Letter appears as part of Senate proceedings of Feb. 3, 1925; Vol. 66, Congressional Record, page 2920.

[13]Report of Sub-Committee of Judiciary Committee of United States Senate on S. 2060—68th Congress, 1st Session (Report No. 362) at page 3.

preme Court of the United States, upon the petition of *any party* thereto, whether Government *or other litigant,* to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

Due process, as guaranteed by the Fifth Amendment, requires the exercise of that power in accordance with proper judicial standards.

This Court acted promptly to implement the new law. It adopted Rule 38. That rule recognized the duty to guarantee due process in the Circuit Courts. It provided that certiorari would issue when,

> *". . . a Circuit Court of Appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision."*

Other Representations Made to Congress to Procure Enactment of Judiciary Amendments.

". . . the Court is hindered from hearing and determining more important cases and from functioning in the performance of its highest duty of *interpreting the Constitution* and *preserving uniformity of decision* by the intermediate Courts of Appeals.

"Although final decisions will be multiplied in the intermediate Courts of Appeals by this Bill, if it shall become a law, yet *every case now reviewable by the Supreme Court under existing law will still be reviewable by that tribunal whenever a question is presented which is of sufficient importance* in the opinion of the

Supreme Court. . . . Through this discretionary power there can and will be a weeding out of all *trivial* and *unimportant cases;* cases brought for delay; cases which cover matters already decided, etc., so that rapidity of action will be achieved; and *the public questions—the vital and important ones—will be reviewed, considered, and decided. . . .*"[14]

Consideration Given to Applications.

"Lest it should be thought that the increase of discretionary jurisdiction might *impair the administration of justice* and lead to *partial hearings* and not secure a decision by the *whole court,* it is proper to call attention to the very thorough and complete system by which discretionary jurisdiction is exercised. In granting or refusing a prayer for certiorari the petitioner gets the judgment of the whole court. The application is not disposed of by a single Justice. The luminous and informing statement of Mr. Justice Van Devanter tells the whole story:

" 'While the authority of the Supreme Court to take cases on petition for certiorari is spoken of as a discretionary jurisdiction, *this does not mean that the Court is authorized merely to exercise a will in the matter* but rather that the petition is to be granted or denied *according to a sound judicial discretion.* . . . Copies of the printed record as it came from the Circuit Court of Appeals and of the petition and briefs are distributed among the members of the Supreme Court, and each judge examines them and prepares a memorandum or note indicating his view of what should be done.

" 'In conference these cases are called, each in its turn, and each Judge states his views in extenso or

[14]Report of House Judiciary Committee on H.R. 8206—68th Congress, 2nd Session—Report Number 1075 at pages 2-3.

briefly as he thinks proper; and when all have spoken any difference of opinion is discussed and then a vote is taken. I explain this at some length because it seems to be thought outside that the cases are referred to particular judges, as, for instance, that those coming from a particular circuit are referred to the Justice assigned to that Circuit, and that he reports on them and the others accept his report. *That impression is wholly at variance with what occurs.*

"'*We do not grant or deny these petitions merely according to a majority vote.* We always grant the petition when as many as four think it should be granted and sometimes when as many as three think that way. *We proceed upon the theory that, if that number out of the nine are impressed with the thought that the case is one that ought to be heard and decided by us, the petition should be granted.*'"[15]

Absolute Right of Review in Cases Presenting Conflict.

". . . it is the *invariable practice* of the Supreme Court, in cases which have been differently decided by Circuit Courts of Appeals to allow a writ of certiorari. *The effort is to bring the law of the United States into uniformity.*"[16]

Standards Governing Action of Supreme Court.

Mr. Justice Van Devanter: "I deem it well to state further the lines on which the Court proceeds in determining whether a writ of certiorari shall be granted. The inquiry is, first, whether or not the case is one in which a petition for certiorari will lie at all; next, whether the questions presented in the case are of wide or public importance or concern only

[15]Report of House Judiciary Committee on H. R. 8206—68th Congress—2d Session—Report No. 1075 at pages 2-3.

[16]Statement by Senator Cummins during Senate proceedings held on Jan. 31, 1925 (66 Cong. Rec. 2754).

the parties to the particular case; next, whether there is any conflict between the decision that is complained of and decisions on the same question in other Circuit Courts of Appeals or in the Supreme Court; and next, if any of the questions determined by the Circuit Courts of Appeals be questions of State Law, whether if not there is a conflict between the decisions of that Court thereon and the decisions of the Court of last resort in the state on the same questions. *Whenever we find such a conflict, that, without more, leads to the granting of the petition, if the case be one in which a petition for certiorari will lie.*"[17]

Probable Cause.

Mr. Justice Van Devanter: "I would say that the granting of the writ means only that the Court and all of its members understand that, in the entire environment of the case, it is one that should be argued at length before them, be considered by them in the light of that presentation and then deliberately decided. *Granting the writ alone means, and only means, that the Court finds probable cause for a full consideration of the case in ordinary course.*"[18]

A Definite Understanding—for the Record.

Justice Van Devanter: ". . . this does not mean that the Court is authorized merely to exercise a will in the matter. . . .

". . . . We do not grant or deny these petitions merely according to a majority vote. . . ."

Mr. Montague: "Is it the purpose of the Court still to exercise very careful scrutiny under the discretionary power in the method you have indicated?"

---

[17]Testimony Feb. 2, 1924 on Hearing before Sub-Committee of Committee on the Judiciary of Senate on S. 2060, 68th Congress, at pages 29-30.

[18]Senate Committee testimony page 30.

Justice Van Devanter: "It is."

Mr. Montague: "Although you ask for discretionary power, you propose to exercise it in the method you have heretofore exercised it?"

Justice Van Devanter:. "Certainly. Of course, we could not maintain an institution and make it accomplish its purpose unless we did, and there is no purpose to do anything else."

Mr. Montague: "I think I understand, but I wanted the record to show that."[19]

Proceedings Before Congress in 1935.

Senate Bill 2176 (74th Congress, 1st Session), sought to provide direct appeal and immediate review in cases where a restraining order prevented enforcement of Federal Law.[20] There were hearings before the Senate Judiciary Committee. On invitation, Chief Justice Hughes attended with Justices Van Devanter and Brandeis. The proceedings had on March 25, 1935 include the following:

Statement of Chief Justice.

"At the outset let me say that I am authorized to speak for all members of the Court, without exception, and, as you have indicated, I have asked Mr.

---

[19]Statement before House Committee at page 18.

[20]This measure, offered by Senator Black, read as follows:

"Be it enacted. . . . That when any judge or court of the United States issues any restraining order, decree, judgment, or injunction prohibiting any Federal Official or employee or Federal Agency or Bureau, or any other person or agency from carrying out the purposes of, or acting under the provisions of any Federal Law, an appeal by the United States shall lie from such restraining order . . . directly to the Supreme Court . . ."

Justice Van Devanter and Mr. Justice Brandeis to accompany me as a Special Committee of the Court, in order that you may have the benefit of their long experience in connection with appellate procedure.

"I desire to submit certain considerations which we feel should be entertained by your Committee in an examination of this proposed measure.

"First, we regard the Bill as unnecessary. The Supreme Court has now the power to bring before it by certiorari any case of the sort described in the Bill in advance of decision by the Circuit Court of Appeals. . . . That power of the Court to bring up cases by writ of certiorari in advance of decision by the Circuit Courts of Appeals was declared many years ago by the Act of March 3, 1891. . . .

"The next consideration that I would call to your attention is that this Bill, we think, would impose a very heavy burden upon the Supreme Court. . . . It seems to me that it is very necessary that, in order that the Supreme Court may properly discharge its very important function, there should be some discrimination, some method of selection in determining the cases that are brought before it. If there is to be a method of selection, who is to make the selection? . . .

"The Court does constantly have to make these selections. Under the Jurisdictional Act of 1925 there are only a limited number of cases in which the right of appeal to the Supreme Court is allowed, and the Court determines on application for certiorari what cases should be brought before the Court. That is a very important exercise of authority, and there is nothing that we do to which we give greater attention with reference to the protection of the jurisdiction of the Supreme Court and its appropriate exercise.

"The principles are quite obvious. Cases should not go to the Supreme Court of the United States simply because of the amount of money involved, or because of the character or prominence of the parties, or because of counsel. The question before the Supreme Court is, manifestly, the importance of the question of law involved, the importance of an authoritative determination by the tribunal invested with that very important function. To consider these various applications with respect to that, not as to the parties, not as to the amount of money involved, not as to counsel, but as to the law. *The parties have a right of appeal to the Circuit Court of Appeals.* That satisfies the rights of individual litigants. When it comes to a *further review* by the Supreme Court of the United States, the higher principle of importance to the public at large is involved."[21]

Statement of Justice Van Devanter.

"Petitions for certiorari are not determined by a majority vote. If as many as four members of the Court, which is a minority, vote for granting a petition for certiorari, it is invariably allowed. Mr. Justice Brandeis (present as a member of the committee of the Court) has been on the Court for 20 years, and he will not recall a single instance in all that period where a petition for certiorari which commended itself to four members of the Court was not granted. That is a rule that is understood and adhered to, and it works well. *The point is that in exercising that certiorari jurisdiction the Court desires to be at fault in taking jurisdiction rather than to be at fault in rejecting it.* That rule is not one of

[21]Hearing before Committee on the Judiciary—United States Senate (74th Congress, 1st Session) on S. 2176, March 25, 1935 at pages 6-7.

recent years. It originated before almost all of the members of the Court ever thought of being there."[22]

Congressional Action in 1937.

Senate Bill 1392—introduced during the First Session of the 75th Congress—provided for Reorganization of the Judiciary. There were hearings before that Committee in the Senate. These included study of the jurisdiction on certiorari—the principles and practical operation of that method of review.

The Report of the Senate Committee contains the following exhibit:

"Supreme Court of the United States.
Washington, D. C.

March 21, 1937

Hon. Burton K. Wheeler,
United States Senate,
Washington, D. C.

My dear Senator Wheeler:

In response to your inquiries, I have the honor to present the following statement with respect to the work of the Supreme Court:

1. The Supreme Court is fully abreast of its work. . . .

2. The cases on our docket are classified as original and appellate. . . . Our appellate jurisdiction covers those cases in which appeal is allowed by statute as a matter of right and cases which come to us on writs of certiorari. . . .

3. The statute relating to our appellate jurisdiction is the Act of February 13, 1925 (43 Stat. 936). That

---

[22]Senate testimony at pages 9-10.

act limits to certain cases the appeals which come to the Supreme Court as a matter of right. Review in other cases is made to depend upon the allowance by the Supreme Court of a writ of certiorari. . . .

"Where the appeal purports to lie as a matter of right, the rules of the Supreme Court (Rule 12) require the appellant to submit a jurisdictional state ment. . . . 'We examine that statement. . . . *As a result, many frivolous appeals are forthwith dismissed and the way is open for appeals which disclose substantial questions.*

4. The Act of 1925 limiting appeal as a matter of right and enlarging the provisions for review only through certiorari was most carefully considered by Congress. I call attention to the Reports of the Judiciary Committees of the Senate and House of Representatives (68th Cong., 1st Sess.). That legislation was deemed to be essential to enable the Supreme Court to perform its proper function. . . . Hosts of litigants will take appeals so long as there is a tribunal accessible. . . . Unmeritorious appeals cause intolerable delays. Such appeals clog the calendar, and *get in the way of those that have merit.*

Under our Federal system, when litigants have had their cases heard in the courts of first instance, and the trier of the facts, judge or jury, as the case may require, has spoken and the case on the facts and law *has been decided,* and when the dissatisfied party has been accorded an appeal to the Circuit Court of Appeals, the litigants, so far as mere private interests are concerned, have had their day in court.

"If *further review* is to be had by the Supreme Court it must be because of the public interest in the questions involved. That review, for example, should be for the purpose of *resolving conflicts* in judicial decisions between different circuit courts of appeals

. . . or for the purpose of *determining constitutional questions* or settling the *interpretation of statutes;* or because of the *importance of the questions of law* that are involved. Review by the Supreme Court is thus in the interest of the law, its appropriate exposition and enforcement, not in the mere interest of the litigants. . . .

"Granting certiorari is *not a matter of favor* but of *sound judicial discretion.* It is not the importanee of the parties or the amount of money involved that is in any sense controlling. The action of the Court is governed by its rules. . . .

"*These rules are impartially applied, as it is most important that they should be.*

"I should add that petitions for certiorari are not apportioned among the Justices. In all matters before the Court, except in the mere routine of administration, all the Justices—unless for some reason a Justice is disqualified . . . participate in the decision. This applies to the grant or refusal of petitions for certiorari. Furthermore, petitions for certiorari are granted if four justices think they should be. *A majority vote is not required in such cases. Even if two or three of the Justices are strongly of the opinion that certiorari should be allowed, frequently the other Justices will acquiesce in their view, but the petition is always granted if four so vote.* . . .

"I think it is safe to say that about 60 percent of the applications for certiorari are wholly without merit and ought never to have been made. There are probably about 20 percent or so in addition which have a fair degree of plausibility but which fail to survive critical examination. *The remainder, falling short, I believe of 20 percent, show substantial grounds and are granted. I think it is the view of*

the members of the Court that if any error is made in dealing with these applications it is on the side of liberality. . . .

"On account of the shortness of time I have not been able to consult with the members of the Court generally with respect to the foregoing statement, but I am confident that it is in accord with the views of the Justices. I should say, however, that I have been able to consult with Mr. Justice Van Devanter, and Mr. Justice Brandeis, and I am at liberty to say that the statement is approved by them.

Respectfully yours,
Charles E. Hughes,
Chief Justice of the United States.

Hon. Burton K. Wheeler,
United States Senate,
Washington, D. C."[23]

[23]Adverse Report of Senate Committee on the Judiciary in regard to Senate Bill 1392 (75th Congress, 1st Session)—Report No. 711, Calendar No. 734, at pages 38-40.

Office - Supreme Court, U.
FILED
JUN 26 194
CHARLES ELMORE CRO
CLE

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 196

ERNEST H. DENICKE,
Petitioner,

vs.

R. D. BRIGHAM, WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, MORTIMER FLEISHHACKER, JR., WALTER A. HAAS, WILLIAM F. HUMPHREY, SAMUEL KAHN, J. C. MCKINSTRY, JOSEPH HABER, JR., WILLIAM B. REIS, LEON SLOSS, JR., ALFRED B. SWINERTON, and JOSEPH O. TOBIN,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

AARON M. SARGENT,
Hobart Building, San Francisco 4, California,
Attorney for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

	Page
Statement of matter involved	2
Other matter pending	3
Questions in common	4
Grounds sustaining federal jurisdiction	4
Third count—publication of false balance sheet	5
Federal jurisdiction over Third Count	8
Misconduct in the Circuit Court	8
Misrepresentation as to nature of complaint	9
Deliberate disregard of pleading	9
Ignorance of rights—relation to cause of action	10
Arbitrary opinion rendered in disregard of judicial standards	11
Reasons for immediate application for certiorari	15
Jurisdictional statement	16
Petitioner's exhibits	16
Questions presented	16
Reasons for granting the writ	17
Appendix to Petition	
Documents used in effecting consolidation	19
Federal Statute concerning publication of condition reports	20
Questions concerning merits of claim	21

Table of Authorities Cited

Cases

	Pages
California Bank v. Kennedy, 167 US 362	5, 13
Chesbrough v. Woodworth, 244 US 72	3, 4, 8, 9, 12, 13
Chicago Life Ins. Co. v. Needles, 113 US 574	5, 14
Cohens v. Virginia, 19 US (6 Wheat.) 264	5, 12, 13, 14, 15
Denicke et al. v. Anglo California Natl. Bank et al., No. 155, Oct. Term 1944	3
Doble v. Buck (CCA 9th Cir. No. 10348)	3
Jones National Bank v. Yates, 240 US 541	3, 4, 13
Macon Grocery Co. v. Atlantic Coast Line RR Co., 215 US 501	5, 13
Siler v. Louisville & Nashville RR Co., 213 US 175	5, 14
Texas & New Orleans RR Co. v. Brotherhood of Ry. & Steamship Clerks, 281 US 548	5, 12, 13
Texas & Pacific Ry. Co. v. Rigsby, 241 US 33	5, 13
The Fair v. Kohler Die Co., 228 US 22	5, 14
Wyman v. Wallace, 201 US 230	4, 13

Codes and Statutes

Act of Feb. 13, 1925	15
12 USCA 34a	2, 9, 10, 17
12 USCA 93	2, 9, 10, 17, 19
12 USCA 161	2, 5, 6, 8, 9, 17, 19
12 USCA 324	6, 8, 9, 17, 19
12 USCA 501a	9, 17
28 USCA 41	15
28 USCA 225	15
28 USCA 347	2, 15
Judicial Code:	
Sec. 24	15
Sec. 128	15
Sec. 240	15, 18

Rules

Page

Circuit Court:
Rule 3 11
Rule 19 8

Texts and Miscellaneous

Methods of Reaching and Preparing Appellate Court Decisions—Report of Judicial Session of Am. Bar Assn. (Aug. 1942) 11

In the Supreme Court
OF THE
United States

October Term, 1944

No.

Ernest H. Denicke,

Petitioner,

vs.

R. D. Brigham, Walter E. Buck, R. Stanley Dollar, Herbert Fleishhacker, Mortimer Fleishhacker, Mortimer Fleishhacker, Jr., Walter A. Haas, William F. Humphrey, Samuel Kahn, J. C. McKinstry, Joseph Haber, Jr., William B. Reis, Leon Sloss, Jr., Alfred B. Swinerton, and Joseph O. Tobin,

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Owen J. Roberts, Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson, and Wiley Rutledge, Associate Justices of the Supreme Court of the United States:

This is an application under Section 240 of the Judicial Code (28 USCA 347) for a review, on certiorari, of the following matter, viz.:

Case No. 10,347 (CCA 9th Cir.) entitled "Ernest H. Denicke, Appellant, vs. R. D. Brigham, et al., Appellees".

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This appeal concerns a consolidation of Anglo California Trust Co. (a State Bank) with The Anglo & London Paris National Bank of San Francisco. Petitioner held shares in the State Bank. He sustained a forfeiture of redemption rights. This resulted from:

1. Violations of the Federal Act under which merger was accomplished (12 USCA 34a).

2. Conduct of the National Bank in publishing a false condition statement in violation of 12 USCA 161.

Both sections were part of the National Bank Act. Directors were liable for violations thereof under 12 USCA 93,—also a provision of that Act. Such section provides:

". . . in cases of such violations (of National Bank Act) *every director who participated in or assented to the same* shall be held *liable in his personal and individual capacity* for *all damages* which the associa-

tion, its shareholders, or *any other person,* shall have sustained in consequence of such violation."

Petitioner is a party affected. He joined directors to enforce their liability under Federal Law. The cause of action was Federal. See,

Chesbrough v. Woodworth, 244 US 72;
Jones National Bank v. Yates, 240 US 541.

The jurisdictional facts were ignored in the District Court. Dismissal was ordered. The Circuit Court filed an opinion in which jurisdictional facts were suppressed. It refused to recognize or follow opinions of this Court. Its "decision" exhibits a total disregard of precedent.

Other Matter Pending.

There are two proceedings involving this merger, viz.: the case at bar, and a companion suit brought by Mary E. Doble, a shareholder of The Anglo & London Paris National Bank. See "Doble v. Buck et al.[1] (CCA 9th Cir. No. 10,348)" docketed herewith. It will aid the Court if the papers therein are given first consideration.

There are some questions in common. Both matters were briefed and argued together in the Circuit Court.[2]

---

[1]The following persons are parties defendant in both cases: Herbert Fleishhacker, Mortimer Fleishhacker, Walter E. Buck, R. Stanley Dollar, Walter A. Haas, William F. Humphrey, J. C. McKinstry, Alfred B. Swinerton and Joseph O. Tobin.

[2]An order in the Circuit Court permitted the filing of consolidated opening and closing briefs. (R. 113; Buck R. 91.) Both matters were argued and submitted together on February 15, 1944 (R. 114, Buck R. 92). Circuit Judges Mathews, Stephens and Healy were assigned therein,—the same Court which acted in case No. 155 October Term 1944, entitled "Ernest H. Denicke and Mary E. Doble v. Anglo California National Bank of San Francisco, et al."

For convenience we refer to this other suit as the "*Buck Case*". The record therein is cited at "Buck R. ....."

Questions in Common.

A State Bank was merged with a National Bank by a contract providing for a compulsory exchange of outstanding shares. Stockholders received a false letter from the president. This represented that an exchange constituted their only remedy. With that letter they received a form to use in surrendering certificates. This was drawn to obtain a waiver of rights in advance. There was a legal notice of meeting. This stated that the contract was on file at the bank—that shareholders might examine it on request. That agreement was so drawn as to conceal everything except the obligation to exchange certificates when two thirds of the stock voted for the plan.

Such documents infringed and prevented free exercise of the limited right of redemption provided by 12 USCA 34a. Stockholders of both banks received substantially the same literature. See appendix page 19.

The violations of Federal Law involved therein are discussed in detail in the petition filed in the *Buck Case*. In the interest of brevity we adopt that presentation herein.

Grounds Sustaining Federal Jurisdiction.

1. Suit arose under Federal Law because brought to enforce liability created by Act of Congress. So held in,

Chesbrough v. Woodworth, 244 US 72;
Wyman v. Wallace, 201 US 230;
Jones National Bank v. Yates, 240 US 541.

2. Suit arose under the laws of the United States because the violation of a duty created by Federal Law was an essential ingredient of the cause of action. So held in,

Texas & Pacific Ry. Co. v. Rigsby, 241 US 33;

Texas & New Orleans RR Co. v. Brotherhood of Ry. & Steamship Clerks, 281 US 548;

Macon Grocery Co. v. Atlantic Coast Line RR Co., 215 US 501.

3. There was a Federal question because a correct decision of case depended on construction and interpretation of Federal Laws. So held in,

Cohens v. Virginia, 19 US (6 Wheat.) 264 at 378;

California Bank v. Kennedy, 167 US 362.

4. Where jurisdiction attaches because of Federal Questions, the Court has power to dispose of the entire controversy. So held in,

Siler v. Louisville & Nashville RR Co., 213 US 175;

The Fair v. Kohler Die Co., 228 US 22;

Chicago Life Ins. Co. v. Needles, 113 US 574.

Third Count.

Publication of False Balance Sheet in Violation of 12 USCA 161.

Before the merger petitioner Denicke held shares in The Anglo California Trust Company. The assets of that bank were put into a national association—The Anglo & London Paris National Bank of San Francisco. A new institution resulted, viz.: The Anglo California National Bank of San Francisco. It became the owner of a consolidated mass of property contributed by both banks.

The value of that mass depended on the conditions in the predecessor banks. The equity acquired by a share-

holder in the new bank depended on the same fact. Denicke was damaged by frauds involving the bank into which his stock was merged. He alleged that just before such merger the Anglo London Paris Bank,

> ". . . published and displayed to the general public a false and fraudulent statement of its condition, in violation of 12 U.S. Code, Secs. 161 and 324 . . . said bank falsely, fraudulently and unlawfully represented to the public, including plaintiff, that the net amount of its unimpaired capital . . . was a sum in excess of the true value thereof to the extent of $6,500,000. The report of its condition . . . concealed this amount of shrinkage . . ." (R. 28, Par. XX.)

Personal loans of respondents were involved in that shrinkage.

> ". . . Herbert Fleishhacker maintained an overdraft in his commercial account . . . which overdraft exceeded the sum of $600,000,—which said defendant was wholly unable to satisfy except by resort to the technical expedient of borrowing from such bank . . ." (R. 28, Par. XX.)

> ". . . R. Stanley Dollar . . . direct obligations aggregating $1,173,062.19 . . . indirect obligations of $502,745.95 all . . . substandard and under criticism by the national banking examiners . . ." (R. 29.)

> ". . . Wm. F. Humphrey . . . direct obligations totaling $263,500 . . . indirect indebtedness . . . $723,500, all of which was classified as slow by said national bank examiners . . . Defendant Humphrey had not been out of debt to Anglo London Bank for . . . ten years prior to the date referred to . . ." (R. 29-30.)

> "J. C. McKinstry . . . $90,000, . . . classified as slow and doubtful." (R. 30.)

"Alfred B. Swinerton . . . direct indebtedness . . . $50,000 . . . indirect . . . $3,775, all . . . classified as slow." (R. 30.)

"Joseph O. Tobin . . . direct . . . $100,000, . . . slow." (R. 30.)

An amount equal to the entire capital stock of the national bank was being used to carry directors' loans,

"A total of between 100% and 150% of the capital stock of said bank was outstanding in the shape of loans to officers and directors corporations throughout said time." (R. 30-31.)

Mortimer and Herbert Fleishhacker were involved in some of that credit pyramid. Their credit structure was classifiled by the examiners as follows:

"Wholly Owned Partnership Enterprises	$ 3,025,654.77
Corporations in which Mortimer and Herbert Fleishhacker were substantially interested	1,184,000.00
Liabilities of Herbert Fleishhacker	4,377,095.25
Corporations in which Herbert Fleishhacker was substantially interested	1,644,708.33
Corporations in which Herbert and/or Mortimer Fleishhacker held between 10% and 25% interests	2,140,662.91
Grand total	$12,372,121.26"

(R. 29.)

The merger was negotiated to conceal this shrinkage and relieve the parties affected from the burden of putting their accounts in shape,

> "The conspiracy . . . was engineered by each of the defendants . . . for the purpose of relieving the officers and directors of Anglo London Bank . . . from the obligation of repaying same . . ." (R. 31.)

The false balance sheet entered into the conspiracy,

> ". . . as an essential part of said conspiracy, said defendants and each of them represented to all of the stockholders of Anglo Trust Co., including plaintiff, that the regularly published balance sheet of Anglo London Bank was a true condition statement executed and published in compliance with . . . 12 U. S. Code, Secs. 161 and 324." (R. 31.)

Petitioner relied thereon,

> "Plaintiff acted in reliance upon the belief that the balance sheet of Anglo London Bank as published before said consolidation was a true statement . . . The damages which he sustained . . . are the direct consequence of the publication of an untrue condition report . . ." (R. 33.)

Federal Jurisdiction over Third Count.

This Court has sustained jurisdiction over such cases. We cite: *Chesbrough v. Woodworth,* 244 US 72 at 78. There has been no qualification of that rule. It is entitled to recognition as a precedent. Petitioner Denicke applies for a writ in order to obtain a judgment in accordance therewith.

Misconduct in the Circuit Court.

The Denicke complaint contains three counts. (R. 4, 24, 28.) In prosecuting appeal a statement of points was filed pursuant to CCA rule 19. (R. 102.) *This seeks appellate review with respect to each count.* (R. 103, Item 6.)

The Circuit Court made a perfunctory reference to the second count. (R. 24.) It ignored the First Count. And it ignored the Third Count. The refusal to pass on those counts is deliberate.

Misrepresentation as to Nature of Complaint.

The opinion states,

> ". . . the gist of the complaint *and of each count thereof* was that, through *ignorance of his rights,* appellant sustained damages . . . that having *failed to inform him* of his rights, appellees were liable . . . The Constitution of the United States did not, nor did the laws of the United States, make it appellees' *duty to inform* appellant of his rights . . ." (R. 120.)

That statement is untrue. The first count is based on overt acts in violation of a federal statute (12 USCA 34a). It concerns the same conduct which the Circuit Court refused to review in the *Buck Case.*

The Third Count concerns publication of a false balance sheet in violation of 12 USCA 161, and a claim of jurisdiction based on *Chesbrough v. Woodworth,* 244 US 72 at 78. Those facts are not mentioned. That case is not cited, or applied. The binding force of that ruling was disregarded.

Deliberate Disregard of Pleading.

The opinion states,

> ". . . the statement (in each count of the complaint) that appellees violated Secs. 34a and 93 of Title 12 U.S.C.A., and the statement (in count 3 . . .) that appellees violated Secs. 161, 324 and 501a of Title 12 . . . were statements of legal conclusions . . . *The*

complaint stated no facts warranting the conclusion that appellees violated Secs. 34a, 93, 161, 324 or 501a. We therefore are not required to accept any of the stated conclusions as correct." (R. 121-122.)

That statement is untrue. The quotations at pages 6 to 8 hereof, taken from the Third Count, are positive and direct. Such statement is likewise untrue as applied to the First Count. See Petition in *Buck Case,* page 3 and appendix thereto page 4.

Ignorance of Rights—Relation to Cause of Action.

Denicke pleaded ignorance of rights—and resultant damage. This was essential to show that these violations of statute created a loss. Had he been aware of his rights, no fraud in the contract or in the literature sent out could have resulted in an injury. The suit was for a forfeiture of those rights. That forfeiture was brought about by conduct in violation of a Federal Law.

The Third Count presents a different question. Reliance on the false balance lulled petitioner into a false sense of security. Had he known about the $6,500,000 shrinkage Denicke would have voted against the plan. He would, in ignorance, have done the precise thing required to protect the right of redemption created by 12 USCA 34a.

These facts are distorted in the opinion:

"We therefore are not required to accept any of the stated conclusions as correct. We reject them, all but even if we accepted them, it would avail appellant nothing, for the complainant did not show that the damages claimed to have been sustained resulted from the claimed violations. Instead, the complaint

showed, as stated above, that the damages . . . resulted from appellant's ignorance of his rights." (R. 122.)

Arbitrary Opinion Rendered in Disregard of Judicial Standards.

The Circuit Court of Appeals for the Ninth Circuit was opened and established on June 16, 1891. It adopted the set of uniform rules promulgated in all circuits. It immediately established the practice of disposing of all cases by written opinion. That practice has been followed to make "certain for litigants the disciplined reasoning" of the judges assigned.[3]

By a rule adopted November 30, 1936 such opinions are required to bear signatures and be filed with the clerk. (CCA Rule 3.) Since that date it has been the rule, and therefore the law, in the Ninth Circuit that all decisions be evidenced by a written opinion or by some other writing sufficient to disclose action of the Court.

The opinion filed in the case at bar exhibits a disregard of every standard which ought to govern judicial conduct in the review of a case in that Court.

---

[3]Report of Judicial Section—Am. Bar Assn. (Aug. 1942) entitled "Methods of Reaching and Preparing Appellate Court decisions." This describes established procedure in Ninth Circuit:

"Cases decided on the merits are upon written opinion, thus making certain for litigants the disciplined reasoning of its judges." (p. 59.)

"To give a true conference between the bench and counsel in the course of the presentation of the appeal." (p. 60.)

"Thereafter to have, before decision, a conference (and often conferences) in chambers of three fully prepared judges." (p. 61.)

"To assign the case for opinion writing only after reaching a decision based upon such consideration." (p. 61.)

"For the careful study by the other two judges of the final form of the opinion before it is handed down." (p. 62.)

First Standard—Sufficiency of Statement of Facts.

Such statement should be true—and it should be complete. The opinion conceals jurisdictional facts which appear in the first and third counts. The purpose and effect of the pleading is unfairly stated.

Second Standard—Analysis of Statute.

Where a case turns on a statute—the provisions of such statute should be analyzed by the opinion in sufficient detail to exhibit the questions involved. That duty was not performed.

Third Standard—Analysis of Contract.

Where a case involves a contract, its terms should be subjected to analysis to develop the issues, and to answer the contentions of the contending parties. In the case at bar we have an agreement alleged to be in violation of an Act of Congress. Neither the statute nor the contract was subjected to analysis.

Fourth Standard—Obedience and Recognition of Authority.

The Circuit Court has refused to recognize the authority of the following cases:

Chesbrough v. Woodworth, 244 US 72 at 78;

Texas & New Orleans RR Co. v. Brotherhood of Ry. & Steamship Clerks, 281 US 548 at 569;

Cohens v. Virginia, 19 US (6 Wheat.) 264 at 378.

Fifth Standard—Consideration of Argument.

The opinion should give proper consideration to the arguments and contentions of *both parties.* It should answer those contentions which are recognized as important. There was a flagrant refusal to perform that

duty. We file herewith a motion to correct diminution and for enlargement of record. This discloses the following proceedings on oral argument,

(1) Request of Circuit Judge Healy that we elaborate argument to cover responsibility for false balance sheet under third count.

(2) Similar questions put by the Court to counsel for respondents.

(3) Further reference to that subject on closing argument.

The following statement was made from the bench:

"Judge Healy: . . . *The third count in this case is the one that gives me difficulty. I will confess that. I do not know about my associates. Neither of you has satisfied me that it does or does not state a cause of action that is cognizable by a Federal Court.*"[4]

In the face of that statement, an opinion was signed and filed which does not refer to any essential fact contained in that count!

Sixth Standard—Discussion of Authority.

The following cases were in point:

Chesbrough v. Woodworth, 244 US 72 at 78;

Wyman v. Wallace, 201 US 230;

Jones National Bank v. Yates, 240 US 541;

Texas & Pacific Ry. Co. v. Rigsby, 241 US 33;

Texas & New Orleans RR Co. v. Brotherhood of Ry. & Steamship Clerks, 281 US 548;

Macon Grocery Co. v. Atlantic Coast Line RR Co., 215 US 501;

Cohens v. Virginia, 19 US (6 Wheat.) 264 at 378;

California Bank v. Kennedy, 167 US 362;

[4]See affidavit with motion for enlargement of record.

Siler v. Louisville & Nashville RR Co., 213 US 175;
The Fair v. Kohler Die Co., 228 US 22;
Chicago Life Ins. Co. v. Needles, 113 US 574.

The Circuit Court opinion does not cite, or follow, or distinguish, or discuss any of those rulings. Its decision exhibits a total disregard of precedent.

Seventh Standard—Duty to Decide Entire Case.

Practically everything in this case has been disregarded. The Circuit Court ignored the first count and it ignored the third count. The legal effect of both counts has been misstated. The Court violated the principle laid down by Chief Justice Marshall in *Cohens v. Virginia*, 19 US (6 Wheat.) 264 at 403.

> "The judiciary cannot, as the legislature may, avoid a measure . . . With whatever doubts . . . a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."

Eighth Standard—Duty to Render an Opinion Containing Reference to Everything Decided.

The opinion should decide everything—everything decided should be in the opinion.

If we are incorrect in our assumption that the Court evaded its responsibility—if we are in error in stating that it refused to pass judgment on the first and third counts of our pleading—then something even more serious has occurred.

A decision has been rendered on all points—*but a part of that decision has been made public and a part of it has been held in secret.*

A part of that decision has been subjected to the scrutiny which attaches to a public pronouncement evidenced by a public document.

The rest of that decision has been concealed—it is a secret not incorporated in any document. That part of the decision is immune from criticism because it cannot be reviewed or examined.

If the Circuit Court of Appeals has refused to determine the questions presented in the First and Third Counts, a writ should issue because of violation of the principle laid down in *Cohens v. Virginia,* 19 US (6 Wheat.) 264 at 403.

If that Court has in fact decided those questions and rendered a decision which conceals its actual conclusions and deliberations, then we should have the benefit of a ruling in this Court, where a proper opinion may be rendered.

Immediate Application for Certiorari.

There was a condition in the Circuit Court preventing relief by application for reassignment or by petition for rehearing in bank. The Court had a membership of six. Consent of the judges now assigned was necessary to effect a change. All joined in the opinion which discloses refusal to exercise jurisdiction. These facts are presented in detail at pages 11 to 13 of the petition filed in the *Buck* case. There was no course to pursue other than by an application for direct relief on certiorari.

JURISDICTION.

This Court has jurisdiction under Section 240 of the Judicial Code as amended by the Act of February 13, 1925. (28 USCA 347.)

The Circuit Court had jurisdiction under Section 128 of said Code. (28 USCA 225.) The District Court had original jurisdiction under Section 24 thereof. (28 USCA 41.)

Judgment was entered in the Circuit Court on April 27, 1944. (R. 123.) Petition is filed within three months of that date.

PETITIONER'S EXHIBITS.

The following are presented herewith:

1. Schedule of documents used in effecting consolidation. (Appendix p. 19.)

2. Federal statute concerning publication of condition statements. (Appendix p. 20.)

3. Analysis of questions in pleadings concerning the merits. (Appendix p. 21.)

QUESTIONS PRESENTED.

1. Right to a writ to secure appellate review of case.

2. Right to a writ to obtain compliance with decisions of this Court cited at pages 4 and 5 hereof.

3. Right to an adequate opinion in the Circuit Court.

4. Right to a writ to obtain relief from the unfair and unjudicial conduct disclosed by the opinion filed in the Circuit Court.

5. Right to an opinion disclosing the actual decision of the Circuit Court upon each substantial question, with an adequate statement of reasons relied upon to support such conclusions.

6. Right to reversal and issuance of a mandate requiring District Court to retain jurisdiction—such jurisdiction being established by the following,

(a) Cause of action created by federal statute. (12 USCA Secs. 34a, 93, 161, 324 and 501a.)

(b) Violation of duty created by such federal laws, appearing as an essential ingredient of the case.

(c) Need for construction and interpretation of said federal laws in order to pronouice judgment.

REASONS FOR GRANTING THE WRIT.

1. To prescribe the standards which should govern the writing of opinions and the rendering of decisions in the Circuit Courts.

2. To present continuance of the abuses disclosed by the record herein. The Circuit Courts are now Courts of last resort in ninety-five percent of all cases. Administration of justice will break down in the Federal Courts unless measures are taken to compel observance of the conduct which should apply to appellate review. Petitioner is entitled to relief from the condition disclosed.

3. To enforce compliance with decisions of this Court.

4. To relieve petitioner from the arbitrary and unjudicial conduct disclosed by the record herein.

5. Total lack of standards in lower Courts. Jurisdiction failed in the District Court. The Circuit Court refused to correct that error. It used a dangerous technique to accomplish that result—concealment of material facts from the opinion. There has either been a refusal to act in a case where the Court was bound to act—or there has been a secret determination on some matters not disclosed in the opinion, and a public pronouncement as to the others. The integrity of the judicial process is affected by this condition.

Under Section 240 of the Judicial Code, we apply for issuance of a writ of certiorari directed to the Circuit Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
June 23, 1944.

AARON M. SARGENT,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the foregoing petition for writ of certiorari is well founded, and that the same is not interposed for purposes of delay.

Dated, San Francisco, California,
June 23, 1944.

AARON M. SARGENT.

(Appendix Follows.)

Appendix to Petition

DOCUMENTS USED IN EFFECTING CONSOLIDATION.

Consolidation Agreement.

Drawn for execution by both banks. Herbert Fleishhacker and Mortimer Fleishhacker signed as presidents of their respective banks. (R. 57.) The directors of both institutions also executed same. (R. 57-58.)

Fraudulent Letter to Stockholders.

A standard letter describing the plan was prepared for the stockholders of both banks. Except as to names and signatures, these letters are identical. Mortimer Fleishhacker addressed such a letter to the shareholders of his bank (R. 60); Herbert Fleishhacker was involved in similar conduct. (Buck R. 62.)

Form Letter for Surrender of Certificates and Waiver of Rights in Advance.

This document was sent to stockholders of both banks. Substantially identical forms were used. (R. 63; Buck R. 65.)

Proxy to Vote in Favor of Plan.

In the case at bar there was a standard form of proxy running in favor of Mortimer Fleishhacker. (R. 65-66.) The proxy for Herbert Fleishhacker's Bank ran in favor of dummies. Both forms were identical. (R. 65; Buck R. 66.)

Part II.

Federal Statute Concerning Publication of Condition Reports. (12 USCA 161.)

"Every association shall make to the Comptroller of the Currency not less than three reports during each year, according to the form which may be prescribed by him, *verified by the oath or affirmation of the president, or of the cashier,* or of a vice-president, or of an assistant cashier of the association *designated by its board of directors* to verify such reports in the absence of the president and cashier, taken before a notary public . . . and *attested by the signature of at least three of the directors.*

"Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified, and shall be transmitted to the Comptroller. . . .

". . . *shall be published in a newspaper* published in the place where such association is established. . . ."

All member banks of the Federal Reserve System are required to comply with the above. See 12 USCA 324.

The Anglo & London Paris National Bank was a national bank at the time of the merger, and as such, was required to publish such reports pursuant to 12 USCA 161, which was part of the National Bank Act.

Directors' liability for publication of untrue condition reports arises under 12 USCA 93, which creates general liability for a violation of any provision of that Act.

Part III.

Questions Concerning Merits of Petitioner's Claim.

This appeal is concerned with original jurisdiction of the District Court. In seeking reversal, petitioner may be required to rebut any adverse inference regarding the merits of his claim. The duty to make that showing would arise from the necessity of showing that the judgment is in fact erroneous. In the lower Courts respondents made two contentions that may require comment.

Presumption Concerning Knowledge of Law. It will not be presumed, as a fact, that Denicke had knowledge of his legal rights, when actually he did not have such knowledge.

Statute of Limitations. The statute did not commence to run as against these claims until actual knowledge, because the conduct charged was in the nature of a fraud. Local law is to that effect.

These subjects are discussed at page 16 of Appendix to Petition filed in the *Buck* case. In the interest of brevity, we adopt that statement herein.

In the Supreme Court
OF THE
United States

Office - Supreme Court, U.S.
FILED
JUN 26 1944
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1944

No. 196

ERNEST H. DENICKE,
Petitioner,

vs.

R. D. BRIGHAM, WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, MORTIMER FLEISHHACKER, JR., WALTER A. HAAS, WILLIAM F. HUMPHREY, SAMUEL KAHN, J. C. MCKINSTRY, JOSEPH HABER, JR., WILLIAM B. REIS, LEON SLOSS, JR., ALFRED B. SWINERTON and JOSEPH O. TOBIN,
Respondents.

MOTION TO CORRECT DIMINUTION AND FOR ENLARGEMENT OF RECORD.

AARON M. SARGENT,
Hobart Building, San Francisco 4, California,
Attorney for Petitioner.

PERRAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No.

ERNEST H. DENICKE,
Petitioner,

vs.

R. D. BRIGHAM, WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, MORTIMER FLEISHHACKER, JR., WALTER A. HAAS, WILLIAM F. HUMPHREY, SAMUEL KAHN, J. C. MCKINSTRY, JOSEPH HABER, JR., WILLIAM B. REIS, LEON SLOSS, JR., ALFRED B. SWINERTON and JOSEPH O. TOBIN,
Respondents.

MOTION TO CORRECT DIMINUTION AND FOR ENLARGEMENT OF RECORD.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Owen J. Roberts, Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson, and Wiley Rutledge, Associate Justices of the Supreme Court of the United States:

Petitioner, Ernest H. Denicke, moves this Court for an order directing issuance of a writ to the Clerk of the

United States Circuit Court of Appeals for the Ninth Circuit, to compel performance of the duties herein specified, required to complete transcript of record.

1. To Forward Original Document.

That said Clerk be required to transmit the following to the Clerk of this Court:

> Original typewritten opinion bearing signatures of Circuit Judges Clifton Mathews, Albert Lee Stephens, and William Healy, filed April 27, 1944, in Appeal No. 10,347.

Reasons.

(a) A true copy of the whole of such document was designated. (R. 128, Item 6.) The Clerk printed the body of such opinion. (R. 115 at 123.) The signature clause was left out. (R. 123.) It is the duty of counsel to suggest diminution and to take steps to correct such record in order that this Court may have the facts before it. A false certificate is attached to such record. This states that the incomplete copy of the opinion as so printed, constitutes a true copy of the original. (R. 132.)

(b) The matter disclosed in the omitted signature clause has bearing on the application for certiorari presented herewith. Petition is being filed without prior request for reassignment or rehearing in bank in the Circuit Court. That Court has a present membership of six. Reassignment and rehearing are alike impossible except by the vote of four judges. Our petition contains statement of reasons for making a direct application to this Court. We are entitled to a record which will show that three members of the Circuit Court signed an opinion

evidencing deliberate refusal to pass upon the questions presented in support of appeal.

2. To Forward Transcript of Oral Argument on Appeal.

That said Clerk be required to transmit the following to the Clerk of this Court:

> Original of reporter's transcript of oral argument of Appeal No. 10,347 presented to Circuit Judges Clifton Mathews, Albert Lee Stephens, and William Healy on Feb. 15, 1944, which transcript was duly filed on March 2, 1944.

Reasons.

On certiorari the following contention is made—that the Circuit Court was under a duty to decide all questions presented, and that its opinion should include adequate reference thereto.

The third count of petitioner's complaint raised an independent ground of jurisdiction based upon publication of a false balance sheet before the merger of June 30th, 1932. Such publication was alleged to be in violation of 12 USCA 161. Directors were charged with liability for that violation under 12 USCA 93. Jurisdiction over that count was claimed by virtue of the decision of this Court in *Chesbrough v. Woodworth,* 244 US 72.

During oral argument serious consideration was given to this third count. The Court acknowledged the importance of the questions presented therein. In spite of those facts it rendered an opinion in which the statements contained in that count are suppressed. The following portions of the Reporter's Transcript of Oral Argument concern that matter:

Remarks During Opening Argument (page 17, line 24 to page 18, line 5, inclusive);

Respondents' Argument (page 37, line 26 to page 38, line 6, inclusive);

Rebuttal Argument (page 24, line 19 to page 26, line 10, inclusive).

These portions of the transcript are quoted in the affidavit filed herewith.

Reasons for Motion in this Court.

It is impossible to obtain relief except by resort to process available in this Court. Time does not permit petitioner to make a preliminary application in the Circuit Court. The filing of a motion in that Court would not afford relief.

DOCUMENTS PRESENTED IN SUPPORT OF MOTION.

1. Transcript of proceedings in Circuit Court, pages 108-132, inclusive, prepared and filed herein.

2. Affidavit filed herewith.

AUTHORITIES IN SUPPORT OF MOTION.

This Court has power to order the clerk of the lower Court to transmit any original document needed to complete a transcript of record. We cite 228 USCA 863, which provides:

> "Upon the appeal of any cause in equity . . . a transcript of the record . . . shall be transmitted to the Supreme Court. Either the court below or the

> Supreme Court may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof."

Under Section 262 of the Judicial Code (28 USCA 377), this Court has power to issue all necessary writs:

> "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

The certiorari power given by Section 240 of the Judicial Code (28 USCA 347), contains authority to do all acts and things required to make it effective. This includes power to ascertain the truth and to compel the making of an adequate record.

In the ordinary case, briefs and oral arguments are not deemed material or recognized as part of the record on a certiorari application. That is true because this Court does not find it necessary to review the intermediate steps taken in a Circuit Court—it acts independently on the legal questions presented.

We submit an entirely different question herewith. The Circuit Court has failed to exercise its appellate jurisdiction. It has rendered an inadequate opinion. That opinion discloses a refusal to determine the questions presented. Jurisdictional facts have been suppressed. The oral argument discloses that the Court had knowledge of the importance of those facts.

We suggest the following procedure on issuance of an order for transmittal of the original documents described:

1. The Circuit Court Opinion should be reprinted by the Clerk of this Court, or page 123 of the present transcript should be amended by an insertion containing the omitted signature clause.

2. Those portions of the Reporter's Transcript of Oral Argument, quoted in the affidavit filed herewith, and described in this Motion, have bearing on the conduct of the Circuit Court. These should be printed by the Clerk of this Court. We hereby designate those portions of such transcript and request proper action to permit their recognition as a Supplemental Transcript on Certiorari.

3. Any matter in such transcript desired by respondents as part of a supplemental record can be made the subject of a designation filed under Rule 9.

We seek issuance of a writ in the proper form to give this Court possession of the original documents specified.

Dated, San Francisco, California,
June 23, 1944.

AARON M. SARGENT,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the foregoing motion is well founded in point of law and fact and that the same is not presented for purposes of delay.

Dated, San Francisco, California,
June 23, 1944.

AARON M. SARGENT,
Attorney for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No.

ERNEST H. DENICKE,

Petitioner,

vs.

R. D. BRIGHAM, WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, MORTIMER FLEISHHACKER, JR., WALTER A. HAAS, WILLIAM F. HUMPHREY, SAMUEL KAHN, J. C. MCKINSTRY, JOSEPH HABER, JR., WILLIAM B. REIS, LEON SLOSS, JR., ALFRED B. SWINERTON and JOSEPH O. TOBIN,

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO CORRECT DIMINUTION AND FOR ENLARGEMENT OF RECORD.

United States of America,
State of California,
City and County of San Francisco.—ss.

Aaron M. Sargent, being first duly sworn, deposes and says:

I am the attorney for Ernest H. Denicke, the petitioner above named. This affidavit is made on his behalf and in support of "Motion to Correct Diminution and for Enlargement of Record.". I am familiar with the documents described therein, which are now part of the files of the Circuit Court of Appeals for the Ninth Circuit, in Appeal No. 10,347.

An original typewritten opinion was filed in such appeal on April 27, 1944. The following is a true copy of the signature clause at page 12 thereof:

> "Judgment affirmed.
>
> **Clifton Mathews**
> **United States Circuit Judge**
> **Albert Lee Stephens**
> **United States Circuit Judge**
> **William Healy**
> **United States Circuit Judge.**"

The matter printed in bold face type was not included in the transcript sent to this Court. (See R. 123.) The clerk of the Circuit Court attached the following certificate to such record:

> "I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred thirty-one (131) pages, numbered from and including 1 to and

including 131, to be **a full, true and correct copy of the entire record** of the above-entitled case in the said Circuit Court of Appeals, **made pursuant to request of counsel for the appellant,** and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, **as the originals thereof remain on file and appear of record in my office.**

"Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, in the State of California, this 24th day of May, 1944.

(Seal) Paul P. O'Brien,
Clerk."

The signature clause attached to such Opinion was not omitted pursuant to my request. The record transmitted to the Clerk of this Court is false in not including such clause.

The Circuit Court Opinion suppressed jurisdictional facts concerning the third count of petitioner's complaint. That count appears at R. 28. During oral argument, said Court recognized the importance of legal questions raised by such count. The following are true quotations from the Reporter's Transcript of the Oral Argument presented on that matter on February 15, 1944:

Remarks of Court During Argument of Petitioner.

"Judge Healy. Before you sit down, will you discuss a little more your third count in the Denicke case? What is the theory that underlies that third cause of action? Will you state it again?

Mr. Sargent. The theory is that before this merger the Anglo and London Paris Bank had a fraudulent

balance sheet. It published assets exceeding the true value of its assets. The Federal law provides, your Honor, that every national bank shall publish a statement of its condition twice a year.

Judge Healy. That was the statement called for by the Comptroller from time to time?

Mr. Sargent. Yes." (Page 17, line 24 to page 18, line 5, incl.)

Remarks of Court During Argument of Respondents.

"Judge Healy. There is one more matter, and that is connected with the same subject that I mentioned to you a moment ago. Your contention with respect to the third count of the Denicke case is that incorporation of the allegations of the first count in effect destroys the allegation referring to or having reference to the fraudulent statement put out by the bank.

Mr. Roche. I was coming to that, your Honor.

Judge Healy. I was going to ask you, even assuming that the first count was not incorporated into the third count, would you then concede that there was a Federal question involved?" (Page 37, line 26 to page 38, line 6.)

Remarks of Court During Petitioner's Argument in Rebuttal.

"Judge Healy. Before the consolidation meeting he alleges that is all he got. Would that exclude—or do you so construe it—the bank statement on which you rely in your third count?

Mr. Sargent. No, I think not. He says these documents constituted the only information he received. It is our intention to allege that is all he got; that is all he received. He alleges, however, he relied upon the balance sheet. Now, counsel are incorrect in making the statement it is humanly impossible to reconcile

these accounts. On the contrary, they are entirely consistent. This statement is in the appendix in our brief, page ii to the appendix.

There are two ways to exercise the right under this section 34(a): One is to make a statement in writing of dissent in advance of the meeting; the other way is to go to the meeting and vote against the plan.

Now, Mr. Denicke did not know about this statutory remedy. He relied upon the condition, the report of this bank, being true. He did not expressly state that he read it, but we think that is a quibble. He did read it; he knows what it contained. He alleges he relied upon it. . . .

Judge Healy. Do you contend, however, the complaint sufficiently alleges the reliance of your client upon this bank statement? The third count in this case is the one that gives me difficulty. I will confess that. I do not know about my associates. Neither of you has satisfied me that it does or does not state a cause of action that is cognizable by a Federal Court.

Mr. Sargent. I will address myself to that point. In the first place, a duty to publish a condition report arises from Section 161, 12 U. S. Code, 161, providing that every national banking association shall make three reports a year and publish them. The officers of the bank are to make such a report. That is a part of the National Bank Act.

Section 93 of the same act says generally that directors of national banks are liable for the violation of any provisions of the chapter. Section 161 is a part of the chapter. The two can be read together.

Where a loss is sustained and it is the result of the publication of such a report, an action lies, and it lies in a Federal court. The decision there is Chesbrough

v. Woodworth, decided by the Supreme Court in 244 US 72. That is the authority for that particular cause of action." (Page 44, line 19 to page 46, line 10.)

Reasons for Enlargement of Record by Motion in this Court.

Ernest H. Denicke, the petitioner herein, is a party to Case No. 155 pending in October Term, 1944, and entitled "Ernest H. Denicke, et al., Petitioners, vs. The Anglo California National Bank of San Francisco, et al., Respondents". That matter is hereinafter referred to as the "*Anglo Case*". Petitioner was unable to obtain certified copies of documents in that proceeding. It was necessary to apply for an order in this Court to support enlargement of record.

In said *Anglo* case, the clerk refused to furnish a certified copy of an irregular opinion filed during adjournment. The Court deprived petitioner of the right to argue a motion brought to obtain a copy thereof. Records and files in said *Anglo* case, which should have been public records, were suppressed.

Time for certiorari herein expires July 27, 1944. Order staying mandate expires July 3, 1944. (R. 126.) An application for further stay has been denied by Circuit Judge Clifton Mathews. Petitioner was unable to obtain action thereon by any other judge. Time does not permit application to this Court for such stay.

The conduct exhibited toward petitioner in the *Anglo* case, including suppression of records therein, indicates that no relief can be obtained in the Circuit Court. It is

necessary to file motion for enlargement when certiorari petition is docketed herein. I believe that the only remedy available in the premises is by an application addressed to this Court.

AARON M. SARGENT.

Subscribed and sworn to before me this 23rd day of June, 1944.

(Seal) CATHERINE E. KEITH,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires December 16, 1946.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ERNEST H. DENICKE,

Appellant,

vs.

R. D. BRIGHAM, WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, MORTIMER FLEISHHACKER, JR., WALTER A. HAAS, WILLIAM F. HUMPHREY, SAMUEL KAHN, J. C. MCKINSTRY, JOSEPH HABER, JR., WILLIAM B. REIS, LEON SLOSS, JR., ALFRED B. SWINERTON and JOSEPH O. TOBIN,

Appellees.

No. 10,347

196

MARY E. DOBLE,

Appellant,

vs.

WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, WALTER A. HAAS, WILLIAM F. HUMPHREY, J. C. MCKINSTRY, ALFRED B. SWINERTON and JOSEPH O. TOBIN,

Appellees.

No. 10,348

197

CONSOLIDATED OPENING BRIEF ON BEHALF OF APPELLANTS.

AARON M. SARGENT,
Hobart Building, San Francisco,
Attorney for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Introductory statement	1
Condition of the record	2
Jurisdictional statement	3
STATEMENT OF THE CASE	3
Legal right to consolidate	5
Unlawful consolidation agreement	6
Unlawful solicitation of proxies	8
False statements in Mortimer Fleishhacker letter	10
Fraudulent notice of shareholders' meeting	13
Second count—Damages for failure to give notice of redemption rights under 12 USCA 34a	15
Special trusts created to conceal sub-standard assets in the Anglo & London Paris National Bank	18
Herbert Fleishhacker overdraft	18
Loans of R. Stanley Dollar	18
General indebtedness of Herbert and Mortimer Fleishhacker	18-19
Credit accommodations involving other directors	19
More than 100 per cent of capital used to support officers' and directors' loans	20
Third count—Damages for publication of untrue condition report of the Anglo & London Paris National Bank	21
Representation that balance sheet was true—stockholders of Anglo California Trust Company induced to join in the plan	22
A false balance sheet concealing $6,500,000 in sub-standard assets	23
Directors knowingly permitted violation of statute	23
Denicke relied upon untrue condition report	23
Measure of damages	24
Allegations suspending statute of limitations	25
Concealment	26
Wilful failure to disclose material facts	26

Pages

Overt acts involving concealment....26-28
Confidence reposed in defendants.... 28
Denial of access to bank records.... 28
Conspiracy to shield defendants by suppressing records 28-30
Active concealment—denial of existence of liability.... 30
Manner in which causes of action were discovered.... 30
Fiduciary obligations of defendants.... 32
Common law liability in addition to case arising under federal law 33

QUESTIONS INVOLVED—HOW RAISED.... 30
Motions to dismiss 35
Reference to judgments 35
JOINT SPECIFICATIONS OF ERROR....35-37
ADDITIONAL SPECIFICATIONS OF ERROR ON BEHALF OF ERNEST H. DENICKE....37-38

ARGUMENT

Outline of argument 38-39
General jurisdiction of the District Court.... 39
A cause of action created by federal statute.... 42
A duty imposed by a federal statute.... 45
The interpretation of a federal statute.... 50
Matters of record disclosing that interpretation of federal statute is necessarily involved.... 56
A miscarriage of justice resulting from failure of the District Court to take jurisdiction and decide all questions presented 58
A cause of action for fraud—aside from the violations of statute 60

Page

Knowledge of law—presumption not available to show actual knowledge of legal rights 62

Damages for fraudulently inducing a forfeiture of legal rights 66

Statute of limitations not available as a defense 70

Effect of decision in National Supply Company v. Stanford University, 134 Fed. (2d) 689 70

Comptroller of the Currency had no power to sanction or validate the fraud 72

Condition of the record as to J. C. McKinstry 72

Conclusion 73

APPENDIX

Analysis of 12 U. S. Code, Section 34a i

Analysis of statutes defining powers and duties of the Comptroller of the Currency iii

Comparison of consolidation agreement in National Supply case with contract made by the Anglo on June 30, 1932 .. viii

Stipulation in Denicke v. Brigham, No. 10347, concerning status of J. C. McKinstry xiv

Stipulation in Doble v. Buck, No. 10348, concerning status of J. C. McKinstry xix

Table of Authorities Cited

Cases

	Pages
Bailey v. Mosher, 63 Fed. 488	45
Baldwin v. Chicago & Northwestern Railway Co., 86 Fed. 167	56
Benedict v. City of New York, 247 Fed. 758	56
Benton v. Deininger, 21 Fed. (2d) 657	45
Black v. Ward, 27 Mich. 191, 15 Am. Rep. 162	64
Bowman v. Payne, 55 Cal. App. 789	69
California Bank v. Kennedy, 167 U. S. 362	52
Chesbrough v. Woodworth, 244 U. S. 72	41, 42
Chicago Life Insurance Co. v. Needles, 113 U. S. 574	56, 59
Cohens v. Virginia, 6 Wheat. (19 U. S.) 264	51, 74
Copper Process Co. v. Chicago Bonding & Insurance Co., 262 Fed. 66	62
Deming v. Carlisle Packing Co., 226 U. S. 102	56
Douglass v. Todd, 96 Cal. 655	69
Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282	55
Fauntleroy v. Lum, 210 U. S. 230	55
Federal Reserve Bank of Atlanta v. Atlanta Trust Co., 91 Fed. (2d) 283	54
Fleishhacker v. Blum, 109 Fed. (2d) 543	61
Fox v. Hale & Norcross Co., 108 Cal. 369	70
Freiburg Company v. Dawson, 274 Fed. 420	56
Garrett v. Reid-Cashion Land & Cattle Co., 34 Ariz. 245, 270 Pac. 1044	62
Glindemann v. Ehrenpfort, 29 Cal. App. 87	24
Goodenow v. Ewer, 16 Cal. 461	69
Grand Trunk Rwy. v. Lindsay, 233 U. S. 42	44
Gully v. First National Bank, 299 U. S. 109	51
Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278	74

Pages

Johnson v. Southern Pacific Co., 196 U. S. 1 47
Jones v. Missouri-Edison Electric Co., 144 Fed. 765 62
Jones National Bank v. Yates, 240 U. S. 541 44

Kavanaugh v. Kavanaugh Knitting Co., 123 N. E. 148, 226 N. Y. 185 61
Kimball v. Pacific Gas & Electric Co., 30 Pac. (2d) 39, 220 Cal. 203 70

MacDonald v. Reich & Lievre, Inc., 281 Pac. 106, 100 Cal. App. 736 70
Macon Grocery Co. v. Atlantic Coast Line Railroad Co., 215 U. S. 501 48
McDonald v. DeFremery, 168 Cal. 189 62
Municipal Metallic Bed Mfg. Corp. v. Dobbs, 253 N. Y. 313, 171 N. E. 75, 68 A. L. R. 1376 65
Murphy v. Sheftel, 121 Cal. App. 533, 9 Pac. (2d) 568 64

National Supply Company v. Stanford University, 134 Fed. (2d) 689 ..... 70, A. viii

Osborne v. Bank, 9 Wheat. 738 49

Portland Railway Co. v. City of Portland, 210 Fed. 667 56

Rued v. Cooper, 119 Cal. 463 68

Schlemmer v. Buffalo, Rochester, etc. Ry., 205 U. S. 1 47
Siler v. Louisville & Nashville RR Co., 213 U. S. 175 ..... 54, 59
Spreckels v. Gorrill, 152 Cal. 383 24

Texas & New Orleans RR Co. v. Brotherhood of Ry. & Steamship Clerks, 281 U. S. 548 48
Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33 47
The Fair v. Kohler Die Company, 228 U. S. 22 ..... 55, 59
Thomas v. Taylor, 224 U. S. 73 ..... 42, 44
Toledo etc. Ry. Co. v. Pennsylvania Co., 54 Fed. 730 49

Wyman v. Wallace, 201 U. S. 230 43

Yates v. Jones National Bank, 206 U. S. 158 42

Codes and Statutes

	Pages
Civil Code, Sec. 1576	69
Civil Code, Sec. 1578	69
Civil Code, Sec. 1710	61, 69
Code of Civil Procedure, Sec. 1963	64
12 USCA 1	A. iii
12 USCA 21	A. iii
12 USCA 22	A. iv
12 USCA 23	A. iv
12 USCA 27	A. iv
12 USCA 30	A. iv
12 USCA 33	A. v
12 USCA 34	2, 3, 5, 15, 17, 34, 36, 46, 56, 57, 62, 63, A. i, v, vi
12 USCA 35	A. v
12 USCA 36	A. iv
12 USCA 51	A. iv
12 USCA 51a	A. iv
12 USCA 51b	A. iv
12 USCA 53	A. iv
12 USCA 56	41
12 USCA 57	A. iv
12 USCA 58	A. iv
12 USCA 59	A. iv
12 USCA 60	41
12 USCA 63	43
12 USCA 93	3, 15, 22, 33, 36, 37, 38, 41, 44, 46, 56, 57
12 USCA 161	3, 20, 22, 23, 34, 37, 38, 41, 44, 56
12 USCA 501a	3, 22, 33, 37, 38, 41, 56
12 USCA 548	51
28 USCA 41(1)	3, 38, 40, 42
28 USCA 225(a)(d)	3
28 USCA 230	3
United States Constitution, Art. III, Sec. 2	53

Texts

California Jurisprudence "Fraud & Deceit", Volume 12, Sec. 88	24
Corpus Juris "Evidence", Vol. 22, p. 148	63
Corpus Juris "Fraud", Volume 22, Sec. 243	24
Corpus Juris Secundum "Actions", Volume 1, at page 990	46
Pomeroy's Equity Jurisprudence, Fourth Edition	66, 67, 68

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ERNEST H. DENICKE,
Appellant,

vs.

R. D. BRIGHAM, WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, MORTIMER FLEISHHACKER, JR., WALTER A. HAAS, WILLIAM F. HUMPHREY, SAMUEL KAHN, J. C. MCKINSTRY, JOSEPH HABER, JR., WILLIAM B. REIS, LEON SLOSS, JR., ALFRED B. SWINERTON and JOSEPH O. TOBIN,
Appellees.

} No. 10,347

MARY E. DOBLE,
Appellant,

vs.

WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, WALTER A. HAAS, WILLIAM F. HUMPHREY, J. C. MCKINSTRY, ALFRED B. SWINERTON and JOSEPH O. TOBIN,
Appellees.

} No. 10,348

CONSOLIDATED OPENING BRIEF ON BEHALF OF APPELLANTS.

INTRODUCTORY STATEMENT.

These are damage suits which arose out of a consolidation proceeding completed on June 30, 1932. The Anglo

California Trust Company, a State bank, was merged into The Anglo & London Paris National Bank of San Francisco, a National banking association, under the provisions of 12 USCA 34a. Ernest H. Denicke and Mary E. Doble were, respectively, shareholders of the state and national banks participating therein. The merger resulted in the formation of the present bank, which is known as The Anglo California National Bank of San Francisco.

The defendants were directors of the constituent banks before June 30, 1932. Appellants were defrauded of their right, as minority shareholders, to obtain an appraisal and payment of the value of their shares. This conduct is alleged to be in violation of the federal act under which the consolidation was accomplished.

Condition of the record.

These actions were not consolidated in the District Court. There are separate notices of appeal—with a separate record in each case. There are certain questions of law that are in common. There has been no consolidation except for the purpose of briefing and argument.[1]

These parties each reserve their right of independent action as shown by the record. Separate mandates should issue as the court may determine in each case.

For convenience we will cite the transcript in Denicke v. Brigham et al., CCA No. 10347 as 47 R. .....; the record in Doble v. Buck, et al., CCA No. 10348 will be referred to as 48 R. ..... Unless otherwise stated, all italics and other emphasis used herein is ours.

---

[1]This court made an order July 29, 1943 granting leave to file consolidated opening and closing briefs. A copy thereof was filed in both proceedings. This brief is filed as a brief in both cases.

JURISDICTION.

The District Court declined jurisdiction,—disregarding federal questions apparent on the face of the record. Dismissals were granted on motion. We appeal from such rulings. Original jurisdiction is sustained by 28 USCA 41(1).

The liabilities result from violations of 12 USCA 34a, the federal statute governing this merger. In the Denicke case there is a further ground to support the jurisdiction —the complaint states a case based on the publication of untrue condition reports in violation of 12 USCA 161 and 324.

The defendants are bank directors. Their liability is based upon 12 USCA 93 and 501a. These sections are respectively a part of the National Bank Act and the Federal Reserve Act.

This court has jurisdiction on appeal under 28 USCA 225(a)(d). Appeal was taken within the period of three months allowed by 28 USCA 230. Judgments in both suits were entered May 15, 1942. Notices of appeal were filed August 12, 1942.[1a] The time did not expire until August 15, 1942.

STATEMENT OF THE CASE.

This consolidation was possible because of authority granted in a federal statute, to-wit: 12 USCA 34(a), which provides:

[1a]In the Denicke matter, judgment is at 47 R. 97, and notice of appeal is at 47 R. 99. In the Doble matter, the corresponding documents will be found at 48 R. 76 and 78, respectively.

> "Any bank incorporated under the laws of any State * * * may be consolidated with a national banking association located in the same State * * * under the charter of such national banking association on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association or bank proposing to consolidate, and which agreement shall be ratified and confirmed by the affirmative vote of the shareholders of each such association or bank owning at least two-thirds of its capital stock outstanding * * *."

Congress included the following terms to protect the minority stock:

> "* * * any shareholder of either the association or the State or other bank so consolidated, who has voted against such consolidation at the meeting of the association of which he is a stockholder, or has given notice in writing at or prior to such meeting to the presiding officer that he dissents from the plan of consolidation, *shall be entitled to receive the value of the shares* so held by him if and when said consolidation shall be approved by the Comptroller of the Currency, such value to be ascertained as of the date of the Comptroller's approval by an appraisal * * * and *the value as ascertained by such appraisal * * * shall be deemed to be a debt due* and shall be forthwith paid to said shareholder *by said consolidated association,* and the shares so paid for shall be surrendered and, after due notice, sold at public auction * * *."

The defendants are charged with infringing rights granted by this part of the statute. There was a binding allotment of stock—all shareholders were compelled to submit to an exchange. The proceeding was so handled

as to impose a default and loss of statutory rights upon all parties affected.

As a result of this default, the shareholders lost their right to demand payment from the consolidated bank. There was no opportunity to surrender stock and obtain the redemption price. We therefore sued for the net amount of the loss. Appellants received depreciated stock in the new bank. The value thereof is credited against the amount that would have been paid by an exercise of redemption rights under 12 USCA 34a. The difference, plus interest, represents the loss sustained.

The defendants are the directors who brought about the merger with knowledge of the violations of statute that were involved.

Legal right to consolidate.

The charters of these banks contained no provisions authorizing merger or consolidation with any other concern. The State law was not applicable because one bank was a national association, created under an Act of Congress. There was no federal statute until February 25, 1927.

On that date Congress amended the National Bank Act, adding a new section to permit the merger of a State bank with a national association.[2] This is the statute which is before us for interpretation. *We are considering a consolidation which could only be accomplished with the aid of its provisions.*

---

[2]Act of Feb. 25, 1927, Chap. 191, 44 Stat. 1225, entitled "An Act to Further Amend the National Banking Laws and the Federal Reserve Act and for Other Purposes". Section 3 of this statute contains the provisions which now appear as 12 USCA 34(a).

Overt acts constituting violation of 12 USCA 34a, the Act permitting consolidation.

For convenience we will present argument on this point by referring to the pleadings in the Denicke suit. There is a direct charge of the violation of federal statute, in the following respects:

1. **Unlawful agreement for consolidation.** The contract is attached to the complaint as an exhibit (47 R. [illegible]). It contains the following terms, inserted *to compel all stockholders to submit to an exchange*, in case of approval by a two-thirds vote.

> "Section 1. The Anglo & London Paris National Bank of San Francisco and Anglo-California Trust Company *are hereby consolidated* under the charter of the first named bank * * *.
>
> "Section 3. * * * The amount of the capital stock of the consolidated association shall be $10,400,000, divided into 520,000 shares of $20 each, * * *
>
> "Section 4. Of the capital of the consolidated association, 400,000 shares *shall be allotted* to the present shareholders of the Anglo & London Paris National Bank of San Francisco, being four shares of $20 par value for each share of $100 par value now held by them, and 120,000 shares *shall be allotted* to the present shareholders of Anglo-California Trust Company, being eight shares of $20 par value for each share of $100 par value now held by them.
>
> "Section 8. This consolidation shall *become effective when it shall have been ratified and confirmed by the affirmative vote of the shareholders* of each of said associations *owning at least two-thirds of its capital stock* outstanding, at a meeting to be held pursuant to a call of the Directors heretofore made,

and shall have been approved by the Comptroller of the Currency of the United States."

There was a binding allotment. The conversion of the old stock used up the exact number of shares authorized for the new bank.[3] There was no intention to adopt 12 USCA 34a by implication. The contract contained no saving clause for dissenters. No man could read this agreement and discover that he had a right to do anything except turn in his certificates on an exchange.

The bank did not intend to recognize the right to do anything else. This is quite apparent because the draftsman incorporated parts of the statute which were for the benefit of the bank, and omitted those clauses which would have protected the minority.[4]

---

[3]The Denicke complaint shows that before the merger there were 15,000 shares of Anglo Trust Company outstanding, to be exchanged for 120,000 shares in the new bank, the basis of exchange being 8 for 1; and that 100,000 shares in the Anglo London Paris Bank were exchanged for 400,000 in the new bank on a 4 to 1 basis (47 R. 7). Similar allegations appear in the Doble Complaint (48 R. 6). The authorized capital of the new bank was 520,000 shares.

[4]Under 12 USCA 34a there is an automatic right of succession to corporate property:

> "All the rights, franchises, and interests of each of such constituent banks * * * in and to every species of property, real, personal, and mixed, and choses in action thereto belonging, *shall be deemed to be transferred* to and vested in such consolidated national banking association *without any deed or other transfer* * * *"

It was unnecessary to include anything in the contract to this effect. However, the bank wanted to adopt this clause, and it did not want to assume the burden of the redemption provision. The framers included the following:

> "All assets of the Anglo & London Paris National Bank of San Francisco and Anglo California Trust Company at date of consolidation shall pass to and vest in the consolidated association, and the consolidated association shall be responsible for all of the liabilities * * *" (47 R. 54, 48 R. 53).

To obtain relief, it was impossible for a shareholder to act under this agreement. *It was necessary for him to break it.*

2. Unlawful solicitation of proxies. On June 24, 1932, these banks held special shareholders' meetings to approve the consolidation plan.[5] Proxies were solicited in violation of 12 USCA 34a. The following literature was used:

(a) Letter signed by the president, explaining terms of the consolidation (Denicke complt. Exb. B, 47 R. 60); see also Doble record, 48 R. 62.[6]

(b) Form letter for surrender of stock certificates (Denicke compl. Exb. B at 47 R. 63-64). See Doble record at 48 R. 65-66.[7]

(c) Legal notice of special meeting called to approve consolidation (Denicke compl. Exb. C, 47 R. 65). See Doble record at 48 R. 61.[8]

---

[5]47 R. 11, 48 R. 8.

[6]Letters were sent to stockholders by Mortimer Fleishhacker and Herbert Fleishhacker, who were respectively the President of Anglo California Trust Company and The Anglo & London Paris National Bank. These letters are identical in form with the exception of the signature, etc.

[7]This letter for surrender of shares was one of the documents that accompanied the president's letter. The same form of instructions for surrender of certificates was used in both banks. The only difference has to do with the name of the bank and the ratio specified as the basis for surrender.

[8]These notices of meeting are identical except as to the name of the bank affected, the name of the officer signing the notice, and the place of meeting. The notice given to shareholders of the Anglo & London Paris National Bank called for a meeting at No. 1 Sansome Street on June 24, 1932 at 2:30 P.M. (48 R. 61). The notice to shareholders of Anglo Trust Co. called for a meeting across the street (at 532 Market Street) one hour later (47 R. 65). Mortimer and Herbert Fleishhacker were officers and directors of both banks. It was possible for them to hold meetings on both sides of the street the same day.

(d) Proxy in favor of the management to be voted in favor of the consolidation (Denicke compl. Exb. D, 47 R. 65-66). See Doble record 48 R. 66-67.[9]

The stockholders did not get a copy of the contract. They did not receive a copy of the statute. They were given nothing to indicate the existence of redemption rights. The pleading so states.[10] They could have taken these papers to an attorney and remained in ignorance unless a man was selected who had special training in the law of consolidation proceedings. There was nothing to indicate the possibility of a separate remedy by statute. The proceeding was referred to as one conducted under "*the laws of the United States*" (see Notice of Meeting, 47 R. 65). *The bank did not say what law it was.* There was no citation. Nothing to enable a stockholder to find the statute or discover what it contained.

No one except the directors ever saw the contract. They are the men who signed it. It was supposed to be on file *at the bank* (47 R. 65). Mr. Denicke and Mrs. Doble had the technical right to go down and ask for it. They did not see it. If they had done so they would not have found the exact provision of law upon which their rights depended. The agreement refers to an act approved No-

---

[9]The same form of proxy was used for both banks. The only difference consisted in names, time and place of meeting, and identity of proxy holders. Mortimer Fleishhacker was named as one of the proxies for the shareholders of Anglo California Trust Company. There was no blank space to permit the stockholder to write in the name of anyone else.

[10]Denicke Compl. Par. IX, sub. 5, 47 R. 16. In the Doble case the same facts are shown by affidavit, 48 R. 46. There was a minute entry incorporating these facts in the pleading as an amendment. 48 R. 71.

vember 7, 1918 (47 R. 49). *A layman could form no intelligent opinion from such a reference.*

The literature used for the solicitation of proxies contained positive misrepresentations in violation of 12 USCA 34a.

False statements in the Mortimer Fleishhacker letter. This document is at 47 R. 60. It is a letter to stockholders written May 25, 1932, to explain the consolidation plan. It starts representing that the agreement was fair; that it was adopted to effect economy in operations. The stockholders were told that a contract had already been signed—that, in effect, their proxies were solicited *to approve of a fait accompli.* We quote:

> "* * * a special meeting of your Board of Directors was held on May 25th, at which *formal action was taken,* approving and *executing an agreement of consolidation* with The Anglo & London Paris National Bank of San Francisco * * *" (47 R. 61).
>
> "* * * your President was directed to call a special meeting of the stockholders for June 24th, *for the purpose of ratifying the action taken.*" (47 R. 61.)

There was an affirmative misrepresentation. The stockholders were given the following explanation as to their legal rights:

> "The agreement provides:
>
> 1. That the consolidation shall be effected under the national charter of The Anglo & London Paris National Bank of San Francisco, with a change of title * * *
>
> 2. That the head office shall be No. 1 Sansome Street * * *

3. It is the further intention, temporarily, to continue * * * the present head office of Anglo California Trust Co. * * *

4. That the capital shall be $10,400,000.00 consisting of 520,000 shares of a par value of $20.00 per share, *which shall be exchanged on the basis of four shares of stock of the consolidated bank for each present share of The Anglo & London Paris National Bank, and eight shares for each present share of the Anglo-California Trust Company:* * * * (then follow provisions specifying the amount of capital and surplus of the new bank).

5. * * * (Reference to a trust to be created in assets not contributed to the capital of the consolidated bank.)" (47 R. 61-62.)

This was the only "information" that the stockholders received about the plan.

This was the only "information" that was furnished. Fleishhacker recommended that the stockholders approve the exchange:

"The basis for such exchange, in the unanimous opinion of your Directors and Executives, *is eminently fair, having been arrived at after most careful consideration of all the factors;* there being many common advantages accruing to the benefit of the stockholders of both institutions." (47 R. 63.)

He said the directors had *unanimously approved it.*

"The consolidation agreement having had the unanimous approval of the respective Boards of Directors and Executives, and having been duly executed by them, it is planned to make the consolidation effective as of June 30th, 1932." (47 R. 63.)

And he called for a *surrender of stock certificates:*

> "May we, therefore, ask that you kindly execute and return the enclosed proxy at your earliest convenience, and that you endorse and forward your stock certificates to the trust department of Anglo California Trust Company, as provided in the enclosed form.
>
> Submitted by order of the Board of Directors.
> M. Fleishhacker,
> President." (47 R. 63.)

Each stockholder received a form letter to be used in surrendering his certificates. This contained the following provisions:

> "The undersigned hereby directs and authorizes you to exchange the enclosed stock for stock of The Anglo California National Bank of San Francisco * * * upon the basis of eight (8) shares of the stock of the last named bank for one (1) share of stock of Anglo California Trust Company.
>
> "The foregoing exchange is to be made *in accordance with the terms of a certain letter* dated the 25th of May, 1932, *addressed to the stockholders* of said Anglo California Trust Company, *signed by Mortimer Fleishhacker,* President, and more particularly set out in an agreement entered into between said * * * (bank) * * * and The Anglo & London Paris National Bank of San Francisco, dated May 25th, 1932." (47 R. 64.)

The complaint shows reliance upon these representations, and that damages were sustained:

> "Plaintiff was led to believe, and he did believe, in consequence of the fraud practiced upon him by

defendants, in violation of said Section 34a, that an exchange of his shares constituted his sole remedy with respect to said consolidation.

"He relied upon this belief in consequence of the trust and confidence which he reposed in the defendants herein, and *as a result of such confidence, he refrained from consulting independent counsel or otherwise making an independent investigation of his legal rights* with respect to such consolidation.

"The letter of transmittal from Mortimer Fleishhacker attached hereto induced plaintiff to believe, and he did in fact believe, that an exchange of shares constituted the only remedy available to him * * * He acted upon such belief and sustained damage, in violation of 12 U. S. Code, Sec. 34a." (47 R. 16.)

3. **Fraudulent notice of stockholders' meeting in violation of federal statute.** 12 USCA 34a includes the following provision regarding notice:

"* * * (the) agreement shall be ratified * * * at a meeting to be held on the call of the directors after publishing notice of the time, place, and *object of the meeting* for four consecutive weeks * * * and after sending such notice to each shareholder of record by registered mail at least ten days prior to said meeting * * *."

To comply with this section a notice of the "object" of a meeting must be *a true statement of the object and purpose thereof.* If the management sees fit to discuss the effect of a plan it must correctly state the consequences to shareholders who approve *and to those who do not approve.* It cannot lawfully represent that the

shareholders have no right to do anything except surrender certificates when a two-thirds vote is cast in favor.

This notice may be construed with the Mortimer Fleishhacker letter, and with the letter for surrender of stock. These papers all went out together as a part of the notice. The meeting was stated to be one held

> "* * * for the purpose of considering and determining by vote *whether an agreement to consolidate* the said bank (Anglo Cal. Trust Co.) and The Anglo & London Paris National Bank of San Francisco * * * under the provisions of the laws of the United States, *shall be ratified* and confirmed * * *." (47 R. 65.)

The agreement "to be ratified" was an illegal one calling for a compulsory allotment of shares.

Liability under the first count in both of these cases is therefore based upon the following violations of federal law:

1. An unlawful agreement of consolidation denying redemption rights.

2. A fraudulent solicitation of proxies to be voted in favor of its adoption.

3. An untrue and unlawful notice of the object of the meeting misrepresenting the effect of the plan.

The duty to refrain from such conduct will be found in Section 34a. Directors are only empowered to adopt *lawful agreements*. Any act in derogation of a right granted by this section is obviously a violation thereof. Furthermore, Congress did not intend to authorize bank

directors to commit torts or perpetrate frauds in accomplishing mergers. There is only authority to consolidate "*on such terms and conditions as may be lawfully agreed upon* * * *."

Directors are liable for a violation of this section under 12 USCA 93, which provides:

> "And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

Second Count—Damages for failure to give notice of redemption rights under 12 USCA 34a.

In deciding the questions presented in this court, we ask the court to construe 12 USCA 34a with the due process clause in the Fifth Amendment. This statute makes a drastic change in the legal rights of minority stockholders involved in a merger. It makes their investment dependent upon the will of a two-thirds majority. Whenever that number of other stockholders vote for a consolidation plan, a dissenter is faced with two alternatives, neither of which may be satisfactory to him. He may accept stock in the new bank at a basis fixed by others. He is not at the conference table when the contract is negotiated. He has no power to change the basis. A surrender of certificates is a "*take it or leave it*" proposition as far as he is concerned. There is nothing else to do unless demand can be made for payment of the value of the old stock. This remedy approximates justice if there is a reasonable opportunity to exercise it. It

may not be a satisfactory form of relief because an appraisal of stock may be required in the middle of a depression when values are below normal. An appraisal takes no account of the earning power and going concern value of a corporation. It is necessarily a figure at which its assets could be sold. It is a liquidation price.

There is no doubt that laws providing for consolidations are constitutional to the extent that a two-thirds vote of other shareholders may authorize it. However, such statutes are sustained as against the minority only on the ground that there is an optional remedy provided for those who do not agree. In the case at bar, we ask the court to construe the redemption clause in 12 USCA 34a. This statute can be sustained only by interpreting that clause in a way which will afford the benefit of due process of law to the minority group.

It is our theory of liability that some affirmative notice of this redemption right is contemplated by the statute, in order that shareholders may have an opportunity to decide between their right to a redemption and their right to an exchange of shares; that there must be a reasonable opportunity at some time and place to exercise or decide not to exercise that right; that something approximating due notice and a reasonable opportunity must be afforded. Congress did not intend to license the torts committed under the guise of this section of the National Bank Act. If the statute had been drawn *to expressly permit the management to conceal and misrepresent the facts* it would undoubtedly have been unconstitutional as a denial of due process of law. The converse is likewise

true. The act can be sustained only by reading into it the duty to carry out a fair meeting on reasonable notice. It is obvious that these questions involve the construction and interpretation of the Constitution as well as 12 USCA 34a. The complaint shows that we have pleaded a cause of action based upon that theory. Mr. Denicke alleges:

1. Ownership of property rights by virtue of his status as a shareholder in Anglo California Trust Co. before the merger (47 R. 24).

2. The constitutional right to the protection of this investment under the Fifth Amendment (47 R. 24).

3. A conspiracy by defendants acting under an unconstitutional interpretation of 12 USCA 34a to deprive Denicke of that investment (47 R. 25).

4. Actual infringement of the rights of Denicke by failure to give notice of redemption rights, by fraudulent solicitation of proxies obtained by concealment of such rights, and by failure to advise Denicke of any procedural steps necessary to prevent a default and loss of remedies under 12 USCA 34a (47 R. 25-26).

5. The holding of a special stockholders' meeting conducted in a manner to suppress all reference to the remedy available for a redemption of shares—a proceeding that gave no opportunity to exercise the privilege granted by statute (47 R. 26, Par. 5).

6. Compulsory legal action applied to force all stockholders to submit to an exchange (47 R. 27).

This count incorporates by reference the statement of overt acts appearing in the first count (47 R. 24, 27). We

allege that redemption would have been demanded if the bank had afforded an opportunity to exercise this privilege (47 R. 27).

Special trusts created to conceal sub-standard assets.

Before the merger the balance sheet of the Anglo & London Paris National Bank was loaded down with sub-standard items involving loans to officers and directors. The situation had been under criticism for a long time. This condition was mentioned repeatedly in the reports of the national bank examiners. The complaint of Mr. Denicke includes reference to the following items:

Herbert Fleishhacker overdraft.

> "* * * Herbert Fleishhacker maintained an overdraft in his commercial account with said bank, which * * * exceeded the sum of $600,000,—which said defendant was wholly unable to satisfy except by resort to the technical expedient of borrowing from such bank." (47 R. 28.)

R. Stanley Dollar.

> "R. Stanley Dollar was obligated * * * (directly in the sum of) * * * $1,173,062.19, upon indirect obligations of $502,745.95, all of which was sub-standard and under criticism by the national banking examiners * * *." (47 R. 29.)

General indebtedness of Herbert Fleishhacker and Mortimer Fleishhacker.

> "Herbert Fleishhacker was obligated to Anglo London Bank upon direct indebtedness totaling $2,518,783.24." (47 R. 29.)

"* * * he was further obligated, with Mortimer Fleishhacker, upon other loans which were classified by the national bank examiners as follows:

Wholly Owned Partnership Enterprises	$3,025,654.77
Corporations in which Mortimer and Herbert Fleishhacker were substantially interested	1,184,000.00
Liabilities of Herbert Fleishhacker	4,377,095.25
Corporations in which Herbert Fleishhacker was substantially interested	1,644,708.33
Corporations in which Herbert and/or Mortimer Fleishhacker held between 10% and 25% interests	2,140,662.91
Total	$12,372,121.26"

(47 R. 29.)

Credit accommodations involving other directors (47 R. 29-30).

Wm. F. Humphrey		
(direct)	$263,500	
(indirect)	723,500	$987,000
J. C. McKinstry		90,000
Alfred B. Swinerton		
(direct)	$ 50,000	
(indirect)	3,775	53,775
Joseph O. Tobin		100,000
Paul Shoup		606,000
Louis Sutter		63,000
T. C. Tilden		35,000
James Tyson		79,000

More than 100 percent of stockholders' investment used to support loans in which executive officers and directors were interested.

> "A total of between 100% and 150% of the capital stock of said bank was outstanding in the shape of loans to officers and directors' corporations throughout said time. An amount in excess of $6,500,000 represented impaired loans which said bank carried on its condition statement and falsely represented to be unimpaired and sound assets, all in violation of 12 U. S. Code, Sections 161 and 324." (47 R. 30-31.)

As a result of this condition, the Anglo & London Paris National Bank had at least $6,500,000 of sub-standard assets before the merger. It published a false balance sheet concealing this amount of loss (47 R. 31). It was impossible to put all of these sub-standard items into the consolidation. If the balance sheet of the new bank did not include these bad loans at face value, there would be a shrinkage. This had to be concealed in some way. The Fleishhacker management did not want to acknowledge that condition to the stockholders. It therefore proposed a consolidation plan which included special trusts to take over assets which the bank did not "*desire to carry into the consolidated association*" (47 R. 52). The agreement provided for two trusts of this character, one to be administered for the benefit of the shareholders of the Anglo & London Paris National Bank, the other for stockholders in Anglo California Trust Company. The losses in this latter bank were negligible. The real purpose of these provisions was to conceal the false condition report published by Herbert Fleishhacker's bank.

which was the national association. These trusts are set up in Section 6 of the consolidation agreement (47 R. 52).

> "Such assets of The Anglo & London Paris National Bank of San Francisco, in excess of the amount necessary to make up its contribution to capital surplus and undivided profits of the consolidated association, as * * * (said bank) * * * *shall not desire to carry into the consolidated association* shall be withdrawn from the assets of * * * (such bank) * * * and transferred by it before the effective date of the consolidation to a trustee or trustees for the ultimate benefit of the shareholders, but under the terms and conditions hereinafter set forth.
>
> "The amount so withdrawn * * * shall be held by the trustee or trustees of that association for a period of five years from the date of consolidation before making distribution to the shareholders * * *.
>
> "* * * during that period any and all of the assets so held by the trustee or trustees, and the proceeds of any cash collections therefrom, may be used to make good any losses sustained by the consolidated bank on assets taken over by it from The Anglo & London Paris National Bank of San Francisco * * *" (47 R. 52-53.)

There was a similar trust for stockholders of The Anglo California Trust Company.

Third Count—Damages for publication of untrue condition statement of The Anglo & London Paris National Bank.

Mr. Denicke had a right to know that the balance sheet of this other bank did not speak the truth. It was mate-

rial for him to know that $6,500,000 in sub-standard assets were concealed in its statement. His complaint contains a third count which pleads a cause of action on this theory. It shows the violation of 12 USCA 161 and 324, requiring the publication of true statements of condition. Directors are liable for the violation of these sections under 12 USCA 93 and 501a. A cause of action is alleged in the following terms:

Fraudulent condition statement prior to consolidation.

> "At all times between March 1, 1932, and July 1, 1932, Anglo London Bank[12] published * * * a false and fraudulent statement of its condition, in violation of 12 U. S. Code, Secs. 161 and 324. Throughout this period of time, said bank falsely, fraudulently and unlawfully represented to the public, including plaintiff, that the net amount of its unimpaired capital, surplus, and undivided profits, was a sum in excess of the true value thereof to the extent of $6,500,000." (47 R. 28.)

Representation that the balance sheet was true, inducing stockholders of Anglo California Trust Company to join in the plan.

> "The conspiracy * * * made a part of this count was engineered by * * * the defendants * * * for the purpose of relieving the officers and directors of Anglo London Bank * * * from the obligation of repaying * * * (their loans). * * * As an essential part of said conspiracy, said defendants * * *

[12]In this pleading we used the term "Anglo London Bank" as an abbreviation for "The Anglo & London Paris National Bank of San Francisco; similarly, "The Anglo California Trust Company" is referred to as "Anglo Trust Co." (47 R. 6).

represented to all of the stockholders of Anglo Trust Co., including plaintiff, that the regularly published balance sheet of Anglo London Bank was a true condition statement executed and published in compliance with * * * 12 U. S. Code Secs. 161 and 324." (47 R. 31.)

A balance sheet in violation of federal law concealing $6,500,000 in sub-standard assets.

"The report * * * published and exhibited to plaintiff and to the general public * * * was inflated to that extent and concealed this amount of shrinkage in the actual value of the assets of said bank; such shrinkage arose from various causes including in particular circumstances which were the result of the misconduct of the following defendants * * *." (47 R. 28.) (Then follows—a statement—the indebtedness mentioned above.)

Directors knowingly permitted violation of statute—liable for consequences.

"The defendants herein, who were directors of Anglo London Bank, knowingly assented to the publication of such untrue condition statement by said bank, and knowingly permitted the officers of said bank to publish such a statement." (47 R. 31.)

Reliance by Denicke on untrue condition report.

"Plaintiff acted in reliance upon the belief that the balance sheet of Anglo London Bank as published before said consolidation was a true statement thereof. The damages which he sustained and which are the subject of this action are the direct consequence of the publication of an untrue condition report * * * (by said bank)." (47 R. 33.)

Denicke has incorporated the statement of overt acts in the first count (47 R. 28, Par. XIX; 47 R. 33, Par. XXIV).

Measure of damages.

Appellants sue for the consequences of a default. They charge that there has been a loss of legal rights imposed upon them by conduct in violation of federal law. They are in the same position as a party who is not able to rescind, and who therefore files an action to recover the loss sustained by fraud. Under these conditions the damages are measured by the difference before and after the fraud. In the instant case this means the difference between the value of shares of the old banks and the actual worth of what was issued after the consolidation. The authorities sustain this method of computing the loss. See:

27 *Corpus Juris*, "*Fraud*", Sec. 243, pp. 92-94;
12 *Cal. Jur.*, "*Fraud and Deceit*", Sec. 88, pp. 843-845;
Glindemann v. Ehrenpfort, 29 Cal. App. 87;
Spreckels v. Gorrill, 152 Cal. 383.

During argument in the District Court counsel suggested that it was necessary for us to take inconsistent positions in claiming that stockholders, involved on opposite sides of the merger, could have sustained a loss in the same transaction. This does not take the facts into account.

Mrs. Doble held shares in the national bank. $6,500,000 in sub-standard assets of that bank were not put into the merger. She was supposed to have an interest in a spe-

cial trust covering that amount of property. She never received an accounting. As far as she is concerned, her interest therein proved to be worthless. In consequence, she obtained nothing out of the consolidation except depreciated stock in a new bank which took over only a part of the property.

Mr. Denicke occupies a different position. His loss was the result of an unfair basis of exchange. This provided for the issuance of 8 shares in the new bank for each share held in Anglo California Trust Company. A much higher ratio should have been adopted. The sub-standard condition of the assets of the other bank furnishes an additional reason to show that the exchange was inequitable.

Without a detailed accounting of these trusts, it is impossible to state exactly what happened. Mr. Denicke has fixed the redemption price of his shares in Anglo California Trust Company by taking the balance sheet of that bank and assuming it to be a correct statement. So far as we know, this is the fact.

Mrs. Doble alleges a redemption price based upon the exact amount per share which the bank had to pay to a shareholder in the Anglo & London Paris National Bank who discovered the fraud and made a demand in time.

Allegations suspending the statute of limitations.

We desire to make an affirmative showing that these claims are not barred. The complaints in both suits are similar in this respect. We summarize the facts pleaded by Denicke.

Concealment.

"Defendants and each of them fraudulently concealed, and caused Anglo London Bank, Anglo Trust Co. and Anglo National Bank, to conceal and suppress from plaintiff all facts and circumstances from which he might determine the nature and extent of his legal right to recover damages based upon the conspiracy which brought about the consolidation of June 30, 1932." (47 R. 36, Par. XXVI.)

Wilful failure to disclose material facts.

"Defendants caused each of the matters which are the subject of this complaint to be thus concealed and kept from the knowledge of plaintiff. This was done by defendants in order to prevent plaintiff and all other shareholders of Anglo Trust Co. from ever instituting or prosecuting any action for damages based upon said consolidation." (47 R. 36, Par. XXVI.)

Overt acts involving concealment (47 R. 36-38).

"For this purpose defendants were guilty of active concealment, particularly as to the following,—

"1. The fact that the agreement * * * was drawn intentionally in violation of 12 USCA 34a.

"2. The fact that the letter of transmittal, the notice of meeting, and the proxy solicitation made in connection therewith, were each in violation of said section.

"3. The fact that said agreement was purposely drawn so as to omit language which might incorporate by reference any minority shareholders' rights * * * that this omission was deliberate and was practiced in order to avoid giving to shareholders any notice which would give real information * * *

"4. The fact that one shareholder of Anglo London Bank had successfully maintained his right to a redemption of shares and that the other shareholders had a legal right to prosecute a claim for damages * * *

"5. The fact that the provisions for creation of special trusts * * * were in fact fraudulent devices employed to conceal the existence of a shrinkage in the balance sheet of Anglo London Bank * * * that the amount of such shrinkage exceeded the sum of $6,500,000,—and that said shrinkage had to be disclosed on the books in order to avoid further publication of an untrue condition report.

"6. After June 30, 1932, there was withheld from shareholders * * * all reference to the administration of these trusts. This was done because any reference to that subject would have led plaintiff to inquire into the nature of his rights * * * defendants believed that an inquiry into this subject would have disclosed the existence of the cause of action for damages which is the subject of this suit.

"7. By its terms the special trust * * * to be set up for the benefit of plaintiff and the other shareholders of Anglo Trust Co. * * * expired June 30, 1937. At that time it became the duty of defendants to render an accounting at a meeting of the shareholders of said bank and to then pay over any balance * * * Defendants wilfully caused Anglo National Bank to fail to account to plaintiff for said fund in order to conceal the cause of action now sued upon. Plaintiff has never received any accounting with respect to the same and he had no knowledge of the existence of such a trust until discovery of his cause of action as herein set forth."

Confidence reposed in defendants.

"Throughout the period extending from June 30, 1932, to date, plaintiff reposed confidence in the defendants herein, with respect to the consolidation proceeding which is the subject of this action. He was first advised of the fact that defendants did not intend to account, and that they were unable to account for the administration of said special trust, when he made legal demand for information with respect thereto. Such a demand was made on or about September, 1940." (47 R. 38-39.)

Denial of access to bank records—Denicke prevented from making investigation of claims.

"For a period of more than two and one-half years immediately preceding the commencement of this action, plaintiff has attempted in various ways to obtain adequate information from the books and records of Anglo National Bank in order to determine the manner in which these defendants have performed their obligations of trust owing to plaintiff as a shareholder thereof. With the exception of defendant Joseph Haber, Jr., all of the defendants joined herein were directors of said bank until approximately one year before the commencement of this suit. Plaintiff's efforts in this respect were unsuccessful and it was only after the extensive use of federal process that he uncovered facts which disclosed that he was the owner of a valid cause of action upon which to base this suit." (47 R. 39, Par. 9.)

Conspiracy to shield defendants by suppressing records.

"Throughout the period from November 7, 1938, to July 7, 1941, the following took place,—

"Defendants acted in conspiracy with Mortimer Fleishhacker and Herbert Fleishhacker and with representatives of Anglo National Bank to protect all of the defendants herein from liability to the shareholders thereof.

"As a part of this plan, defendants co-operated through the firm of Chickering & Gregory, attorneys at law, who were selected for the purpose of aiding these defendants in their efforts to escape liability. Said attorneys actively concealed all facts which were of a kind that would disclose the existence of liability. They refrained from furnishing documents or permitting the examination of records except when subjected to the use of federal process.

"Said attorneys filed deliberately false interrogatories in an action now pending in this court known as Denicke v. Anglo California National Bank, being proceeding No. 21033-S, doing so for the purpose of avoiding a disclosure of the extent to which these defendants had been guilty of breach of trust as directors of Anglo National Bank.

"Between November, 1938, and October 19, 1939, the said Chickering & Gregory acted as counsel of record for William B. Reis, Samuel Kahn, Leon Sloss, Jr., each of whom are defendants herein, also for other directors of Anglo National Bank. Appearance in that capacity was made by said attorneys in actions Nos. 21033-S and 21161-R, now pending in this court.

"Said attorneys have now attempted to change their position and are attempting to represent said bank and at the same time to protect the interests of the directors of such bank in order to relieve the latter of the obligation to answer in damages for

losses imposed by such directors upon Anglo National Bank * * *." (47 R. 39-40.)

Active concealment—denial of existence of liability.

"Throughout the period from November, 1938, until July 7, 1941, the said Chickering & Gregory, purporting to act in the name of Anglo National Bank, have practiced active concealment and have made false statements to plaintiff and his counsel for the purpose of leading plaintiff to believe that there is no substantial liability which he can enforce against any of the defendants herein * * * As a result of this concealment and because of the other circumstances above mentioned, plaintiff had no opportunity to discover his cause of action or to enforce the same until a relatively short time before commencement of this action." (47 R. 40-41.)

Manner in which causes of action were discovered.

The complaint of Denicke shows:

1. That a copy of the consolidation agreement was obtained in December, 1938; that this disclosed nothing to indicate the liability (47 R. 41, Par. XXVII.)

2. That William A. Doble, the husband of appellant Mary E. Doble, tried to get information about the special trust for shareholders of The Anglo & London Paris National Bank in March, 1939; that there was no disclosure at that time (47 R. 41-42).

3. That in August, 1940, Denicke requested a certified public accountant to calculate the shrinkage which occurred in the balance sheet of the present bank during

the recapitalization completed in December, 1938; that it was found possible to compare balance sheets and determine therefrom write-offs amounting to about $11,000,000 (47 R. 42).

4. That thereafter Denicke requested his accountant to make a similar calculation from balance sheets of the constituent banks before the merger of June 30, 1932, and that he determined therefrom that the condition statement of The Anglo & London Paris National Bank was false by at least $6,500,000 (47 R. 43).

5. That Denicke then requested his attorney to make an examination of the law to ascertain whether he had any legal remedy under this set of facts (47 R. 43).

6. That he was advised by counsel that an action would lie; that his first report in the matter was rendered about October, 1940; that the bank hampered an investigation that was taken up in support of this claim (47 R. 43).

7. That the delay which occurred between this time and the date of filing suit (August 7, 1941) was the result of negotiations conducted in an effort to dispose of these claims without litigation (47 R. 43-44).

8. That Denicke did not obtain a copy of the Mortimer Fleishhacker letter which was attached to the amended complaint as Exhibit "B" until after suit was filed (47 R. 43).

The allegations in the Doble complaint are not identical. The general condition resulting from the hostility

of the bank management applies. Mr. Denicke communicated the result of his investigations to Mrs. Doble on August 4, 1941 (48 R. 25).

Fiduciary obligations of defendants.

There was a fiduciary obligation owing to appellants from these defendants. This is a further fact to suspend the running of the statute. In the Denicke case there was a joinder of directors in both of the constituent banks (47 R. 21-23). Those who served in Anglo California Trust Company were under a direct obligation because of their status as representatives of the stockholders. The directors in the other bank were promoters of the consolidation. The complaint charges conspiracy. These defendants were all trustees so far as Mr. Denicke is concerned. There is one defendant, Joseph Haber, Jr., who was not an officer of either bank. Mr. Haber prepared the consolidation agreement and other papers used to defraud shareholders of their redemption rights. His employment as counsel for these banks presumed a fiduciary duty to the stockholders, whom he was supposed to protect. Jurisdiction exists as to defendant Haber because it is a part of a controversy arising under federal law.

The defendants in the Doble case were all directors of the Anglo & London Paris National Bank (48 R. 4-5). Mrs. Doble held shares in that bank. The trust relationship is clear.

Common law liability in addition to case arising under federal law.

There is a liability for fraud and deceit on this set of facts in addition to the liability which arises under federal statute. Appellants had the right to reserve this cause of action in their pleading. The Denicke complaint contains the following allegations for that purpose:

> "The construction which plaintiff relies upon in asserting liability under each of the counts of this amended complaint are asserted in good faith, upon the advice of counsel, and in the exercise of the bona fide belief that the same are well founded both in law and in fact, and that such liabilities are created in his favor by the statutes and constitutional provisions cited.
>
> "In asserting such liability, plaintiff reserves such rights as may be available to him at common law in the trial of any and all other issues and facts over which the Court may have jurisdiction as an incident to its power to try and determine the federal causes of action which are the foundation of this suit." (47 R. 35-36.)

QUESTIONS INVOLVED—HOW RAISED.

These are appeals from judgments of dismissal entered on the alleged ground of a want of federal jurisdiction. The court refused to take jurisdiction because of the lack of a statute expressly conferring it in this particular type of suit.

The causes of action are created by federal statute (12 USCA 93 and 501a). The duties violated are also imposed

by act of Congress (12 USCA 34a, 161 and 324). In addition, the interpretation of federal law is necessarily involved.

It is only necessary to examine the opinion to discover that the court devoted attention almost entirely to an effort to determine whether these particular statutes create a liability, as appellants insist that they do—or whether the conduct of defendants was within the law, as claimed. There was undoubtedly a controversy.

The District Court improperly decided the federal questions adversely to appellants, and declined to determine the other questions. In consequence, there has been a miscarriage of justice.

The lower court seems to have been influenced mainly by the fact that the Comptroller of the Currency approved the consolidation. This has no bearing on the question whether the rights of minority stockholders were violated, or whether directors are liable for such violation.

Our pleadings contain a copy of the consolidation agreement and other literature sent to stockholders in connection with the plan. The District Court ignored our argument and declined to interpret these instruments.

The jurisdictional facts are set forth in the following documents of record:

1. Amended complaint of Ernest H. Denicke (47 R. 4-66).

2. Amended complaint of Mary E. Doble (48 R. 3-28).

3. Minute order of Jan. 12, 1942, entered in Doble case granting motion to amend (48 R. 70-71).

4. Affidavit in support of Doble complaint, accepted as an amendment thereto by minute order of Jan. 12, 1942 (48 R. 44-67).

5. Supplemental affidavit lodged in Doble case to verify complaint and support showing of good faith (48 R. 72-75).

Motions to dismiss. The jurisdiction was attacked in a series of motions. These also raised objections going to the merits. We have printed all motions on file in order that this court may determine the entire controversy.[13]

Denial of jurisdiction. The proceedings terminated by orders granting motions to dismiss. See

Denicke case—Order of Dismissal (R. 97), and Minute Order at R. 98;

Doble case—Decision and Order of Dismissal (R. 76), and Minute Order at R. 77.

JOINT SPECIFICATIONS OF ERROR.

Ernest H. Denicke and Mary E. Doble, and each of them, hereby specify the following errors in support of their respective appeals herein.

---

[13]In the Denicke suit motions filed by Mortimer Fleishhacker (R. 74), Joseph Haber, Jr. (R. 68); Walter A. Haas (R. 70); Walter E. Buck (R. 73); Wm. B. Reis (R. 76); Samuel Kahn (R. 77); Joseph O. Tobin (R. 79); Alfred B. Swinerton (R. 80); R. D. Brigham (R. 82); Herbert Fleishhacker (R. 83); R. Stanley Dollar (R. 84); Wm. F. Humphrey (R. 85); and Leon Sloss, Jr. (R. 86).

In the Doble case motions filed by Mortimer Fleishhacker (R. 40); Herbert Fleishhacker (R. 30); Joseph O. Tobin (R. 33); Walter E. Buck (R. 35); Alfred B. Swinerton (R. 37); Walter A. Haas (R. 38); R. Stanley Dollar (R. 42); Wm. F. Humphrey (R. 43).

1. The District Court committed error in refusing to retain jurisdiction of the causes of action set forth in the first counts in the complaints of appellants herein, for the following reasons:

(a) Said counts plead a cause of action created by federal statute, to-wit: 12 USCA 93, under which officers and directors of national banks are made liable for the violation of 12 USCA 34a, which is a provision of the National Bank Act.

(b) Said counts plead a cause of action for damages resulting from the violation of a duty created by statute, to-wit, by 12 USCA 34a, which is the act under which the consolidation herein was accomplished. Said cause of action arises under federal law because the duty violated is one imposed by an act of Congress.

(c) Said counts plead in good faith a cause of action which can not be decided without the construction and interpretation of federal statutes, viz.: 12 USCA Secs. 34a and 93. There is jurisdiction regardless of whether the court may interpret these statutes in favor of appellants or in favor of appellees when the action is determined on the merits.

2. The District Court committed error in refusing to retain jurisdiction of the causes of action set forth in the second counts in the complaints of appellants herein, for the following reasons:

(a) Said counts plead in good faith a cause of action which can not be decided without the construction and interpretation of 12 USCA 34a with the due process clause of the Fifth Amendment. There is jurisdiction of that controversy irrespective of how said question may be decided on the merits.

(b) Said counts plead a cause of action for damages resulting from the violation of a duty created by statute, to-wit, by 12 USCA 34a as construed with the due process clause of the Fifth Amendment. Such cause of action arises under federal law because the duty is one imposed by an act of Congress.

3. The District Court committed error in refusing to retain jurisdiction of the causes of action set forth in the first and second counts of said complaint, for the purpose of deciding the non-federal questions presented therein—there being jurisdiction to pronounce judgment upon such issues because of the federal questions disclosed in the record.

ADDITIONAL SPECIFICATIONS OF ERROR ON BEHALF OF ERNEST H. DENICKE.

Ernest H. Denicke specifies additional error in support of his appeal as follows:

4. The District Court committed error in refusing to retain jurisdiction of the cause of action set forth in the third count of the complaint of said appellant for the following reasons:

(a) Said count pleads a cause of action created by federal statutes, to-wit: 12 USCA Secs. 93 and 501a, under which officers and directors of national banks and member banks of the Federal Reserve System are made liable for the violation of 12 USCA Secs. 161 and 324.

(b) Said count pleads a cause of action for damages resulting from the violation of duties created by statute, to-wit, by 12 USCA Secs. 161 and 324.

Said cause of action arises under federal law because the duties violated are imposed by acts of Congress.

(c) Said count pleads in good faith a cause of action which can not be decided without the construction and interpretation of federal statutes, viz.: 12 USCA Secs. 93, 161, 324 and 501a. There is jurisdiction regardless of whether the court may interpret these statutes in favor of appellant Denicke, or in favor of appellees when the action is determined on the merits.

5. The District Court committed error in refusing to retain jurisdiction of the cause of action set forth in the third count of the complaint of said appellant, for the purpose of deciding the non-federal questions disclosed therein—jurisdiction to pronounce judgment in that respect being granted by virtue of the federal questions involved in the same controversy.

OUTLINE OF ARGUMENT.

We have included a detailed outline of the pleadings in our statement of facts in order that the court may understand the theory of liability to support jurisdiction. It will be possible to limit the argument to a discussion of general principles.

1. The District Court has jurisdiction of all controversies arising under federal law in view of 28 USCA 41(1). It is unnecessary to support the jurisdiction by a specific act conferring power to try a particular type of case.

2. A suit arises under federal law whenever the liability to be enforced is created by an act of Congress.

3. There is a federal question whenever a cause of action pleaded involves the violation of a duty created by a federal statute. It is unnecessary for such a statute to include penalties. The fact that the duty arises under the statute and is created by it, is sufficient to support jurisdiction.

4. A case arises under federal law where the interpretation of an act of Congress, or a provision of the federal constitution is necessarily involved. Jurisdiction on this ground does not depend upon the outcome. It is sufficient to show that a decision on a point of federal law will be necessarily involved.

5. The existence of these questions gave the District Court general jurisdiction to decide everything, including the non-federal questions apparent on the face of the record. It is the duty of this court to determine the whole controversy on appeal.

We intend to present our case by discussing these principles in the order mentioned.

General jurisdiction of District Court.

The power to decide controversies arising under federal law is granted by Section 2 of Article III of the Constitution.

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States * * *"

Congress has executed this grant of power by including it as a ground to support original jurisdiction in the District Court. 28 USCA 41(1) provides:

> "The district courts shall have original jurisdiction as follows:
>
> "* * * Of all suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made under their authority * * *"

There are other provisions in 12 USCA 41 conferring jurisdiction over particular matters regardless of the amount in controversy. We have quoted the part of this act which constitutes the general grant of power.

The following statement appears in the opinion of the District Court:

> "A number of the sections of the United States Code, dealing with the subject matter of National banks, make special provision for suits in Federal Courts. There is no such provision respecting a suit, such as here under consideration, where the complaint is based on alleged conspiracy on the part of directors to publish a false report of the condition of one of the banks to be consolidated * * * Where a shareholder seeks to recover damages as a result of such alleged fraudulent action, jurisdiction of a court to determine the same, whether Federal or State, is controlled by the provisions of the statutes respecting diversity of citizenship and the amount involved." (47 R. 96.)

This statement is wholly at variance with the decisions. The Supreme Court has sustained jurisdiction of suits

arising under the National Bank Act, without reference to any clause in that act conferring jurisdiction in any particular type of case. See

Chesbrough v. Woodworth, 244 U.S. 72.

This was a suit for damages resulting from the publication of a false condition report of a national bank in violation of 12 USCA 161—the identical statute involved in the third count of the Denicke complaint. There was also a liability for the declaration of illegal dividends contrary to 12 USCA 60 and for the illegal withdrawal of capital in violation of 12 USCA 56. The directors were charged under 12 USCA 93. This is the general provision in the National Bank Act imposing liability for the violation of any of its terms. It provides:

> "* * * in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

These sections of Title 12 U. S. Code contain no provision to specify what court shall have jurisdiction over violations. 12 USCA 93, the section imposing liability, is also silent on that point.[15]

---

[15]12 USCA 93 contains a clause specifying that any action to forfeit the charter of a national bank must be determined by a federal court in an action for that purpose brought by the Comptroller of the Currency. There is no other reference to jurisdictional matters. Clearly, the federal and state courts have concurrent jurisdiction over other violations of the act, and a plaintiff has a right to elect by filing in the District Court, and a defendant has a corresponding right to remove the action to the federal court on the ground that the case arises under federal law.

Congress left the question of jurisdiction out of these statutes, as it has done in many other cases, because there is a general grant of power to the District Court under 28 USCA 41(1). In *Chesbrough v. Woodworth* jurisdiction was sustained on that ground. The court said:

> "But it is urged that the plaintiff brought this action under Section 5239, Rev. Stats.,[16] in the Circuit Court of the United States for the Eastern District of Michigan, in which all of the parties resided, and that not that court but the state court had jurisdiction * * *
>
> "This section was considered in Yates v. Jones National Bank, 206 U.S. 158, 179, and it was held that the rule expressed by it is exclusive and precludes a common law liability for fraud and deceit. To the same effect are Thomas v. Taylor, 224 U.S. 73, and Jones National Bank v. Yates, 240 U.S. 541. *Necessarily a federal question is involved and there was jurisdiction in the courts below.*"

A cause of action created by a federal statute.

One type of case within Federal jurisdiction arises where the statute itself *creates* a cause of action, declaring in specific terms "that certain persons *shall be liable* * * *" We have that situation in the case at bar. Damages are claimed under 12 USCA 93, this provides:

> "* * * in cases of such violation (of the National Bank Act), every director who participated in or assented to the same ***shall be held liable in his personal and individual capacity*** for all damages * * *."

---

[16]This section of the revised statutes is the provision which now appears in the United States Code as 12 USCA 93.

Here the jurisdiction cannot be in doubt because *the cause of action itself* is created by a federal statute. Cases arising under the National Banking Laws are recognized as within the original jurisdiction of the District Court. See

Wyman v. Wallace, 201 U. S. 230.

This was a suit to enforce stockholder's liability under 12 USCA 63, providing:

> "The shareholders of every national banking association *shall be held individually responsible* for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein * * *."

There was no provision *expressly conferring federal jurisdiction of an action to enforce its provisions.* Nevertheless, the Supreme Court held that the District Court had the power to try a case arising thereunder. At 201 U. S. 241, the court said:

> "The case presented was one arising under the laws of the United States. *It was a suit to enforce a special right given by those laws.* Section 5220, Stats. * * * (permits voluntary liquidation).
>
> "By Section 5151 Rev. Stats. stockholders in national banks are made liable for all contracts, debts * * *.
>
> "*In proceeding, therefore, by this suit to enforce* in behalf of himself and all other creditors of the American Bank *the extra liability imposed by Rev. Stats., Sec. 5151, a case was presented arising under the laws of the United States, and of which, independently of the matter of diverse citizenship, the Circuit Court had jurisdiction.*"

Under federal law, national banks are required to publish true statements of their condition.[17] Where one is injured by the publication of a false report, officers and directors are liable. The Supreme Court has sustained federal jurisdiction in such a proceeding.[18] See

Jones National Bank v. Yates, 240 U. S. 541 at 550.

At 240 U. S. 550, the court said:

> "It is insisted that the writs should be dismissed in the view that the plaintiffs in error sought to enforce liability upon non-Federal grounds and that the Federal question was raised exclusively by the defendants in error. But this objection ignores the nature of the plaintiffs' case. The fact that their petitions did not refer in terms to the Federal statute is not controlling. Thomas v. Taylor, 224 U. S. 73, 78, 79; Grand Trunk Rwy. v. Lindsay, 233 U. S. 42, 48. It was alleged that statements published by the defendants, acting as directors and officers of the bank,

---

[17]12 USCA 161:

"Every association shall make to the Comptroller of the Currency not less than three reports during each year, according to the form which may be prescribed by him, verified by the oath * * * of the president, or of the cashier * * * (or other officer designated) * * *

"Each such report shall exhibit, in detail under appropriate heads, the resources and liabilities of the association * * * and shall be transmitted to the Comptroller * * * and the statement of resources and liabilities, together with acknowledgment and attestation in the same form in which it is made to the Comptroller, ***shall be published in a newspaper published in the place where such association is established*** * * *"

[18]The liability for violation of 12 USCA 161 is created by 12 USCA 93. The court will observe the method of arrangement adopted by Congress in the National Bank Act and Federal Reserve Act (Chapters 2 and 3 of Title 12). There is one section creating liability in each act, phrased to cover any and all violations thereof. See 12 USCA 93 and 501a.

with respect to its financial condition, were false, and were known to be false * * *.

"*The conclusion of the trial court that there could be a recovery at common law, independent of the federal statute, did not alter the inherent character of the actions* * * *. Although the defendants alleged in their answers that if any liability attached to them as directors it was determined by the federal act, the construction of which was necessarily involved, this was not properly speaking a matter of affirmative defense * * *. We conclude that this court has jurisdiction."

See

Benton v. Deininger, 21 Fed. (2d) 657,

where a complaint based on a false condition report was sustained under this section (12 USCA 161). See also

Bailey v. Mosher, 63 Fed. 488,

holding that an action under this statute, filed in a state court might be removed and tried in the federal court.

A duty imposed by a federal statute.

There is a second type of case—one where the cause of action is not created in express terms by statute, but there is *a duty imposed by some term of a statute,* and *a violation of such duty* is charged. Such statute is involved in the litigation as one of the elements necessary to establish a tort.

A cause of action in tort requires proof of a duty owing to the injured party, a violation of that duty, and proof of damage. ***Each of these elements is an essential ingredient.***

The duty owing to the injured party may arise at common law or it may be one imposed by a statute. If it is founded upon a statute, the cause of action arises under that statute.

See

Corpus Juris Secundum, Volume 1, "Actions", at page 990:

"A right of action under a statute which supersedes the common law is strictly a statutory right of action, although the same facts would have constituted a right of action under prior common-law principles * * *.

"It is a general rule that, where a statute imposes a duty for the benefit or protection of particular individuals or classes of individuals, a violation of such duty gives a right of action to any person for whose benefit or protection the statute was enacted, for any damages he has sustained thereby * * * as against the person guilty of the violation * * * and also applies although the statute which imposes the duty does not in terms create a right of action, or prescribe any remedy for its enforcement or violation * * *."

In the District Court, defendants claimed that 12 USCA 34a is not a part of the National Bank Act. It was suggested that the committee appointed to frame the United States Code made an error in classification. From this premise counsel argue that 12 USCA 93 does not impose a liability for a violation of 12 USCA 34a. We are satisfied that this contention is without merit. It is certainly immaterial. It is only necessary for us to show that a duty imposed by 12 USCA 34a was violated. The violation of any term of that section raises a federal question.

An action can be maintained for the violation of a duty imposed by federal statute, even though such act contains no clause providing a penalty. See

Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33, at pages 39, 40.

This was a suit for damages based upon a violation of a term in the Interstate Commerce Act requiring the maintenance of safety appliances on railway cars. At 241 U. S. 39-40, the court said:

> "None of the acts, indeed, contains express language conferring a right of action for the death or injury of an employee; but the safety of employees and travelers is their principal object, and the right of private action by an injured employee, even without the Employers' Liability Act has never been doubted. (See Johnson v. Southern Pacific Co., 196 U. S. 1; Schlemmer v. Buffalo, Rochester etc. Ry. 205 U. S. 1, 8; * * *. *A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover* the damages from the party in default *is implied*, according to a doctrine of the common law expressed in 1 Com. Dig. Tit. Action upon Statute (F), in these words: 'So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.' * * *
>
> "Plaintiff's injury was directly attributable to a defect in an appliance which by the 1910 Amendment was required to be secure, and the act must therefore be deemed to create a liability in his favor, unless it be beyond the power of Congress under the Com-

merce Clause of the Constitution to create such a liability in favor of one not employed in Interstate Commerce."

See also

Texas & New Orleans RR Co. v. Brotherhood of Ry. & Steamship Clerks, 281 U. S. 548 at 569:

This was an action based upon violation of a duty imposed by the Railway Labor Act of 1926. At 281 U. S. 569, the court said:

> "*The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties.* Many rights are enforced for which no statutory penalties are provided. In the case of the statute in question, there is an absence of penalty, in the sense of specially prescribed punishment, with respect to the arbitral awards * * * but in each instance a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each * * *."

Suits to enforce compliance with duties imposed by act of Congress, and actions for damages resulting from the violation of duties created by such acts are recognized as within the jurisdiction of the federal courts. See

Macon Grocery Co. v. Atlantic Coast Line Railroad Co., 215 U. S. 501.

This was a suit to enjoin the violation of duties imposed by the Interstate Commerce Laws. It was held that the action was within the jurisdiction of the District Court. At 215 U. S. 507, the court said:

> "Cases arising under the laws of the United States are such as grow out of the legislation of Congress,

whether they constitute the right or privilege, or claim, or protection, or defense of the party, in whole or in part, by whom they are asserted. Story, Const. Sec. 1657. It was said in Osborne v. Bank (9 Wheat. 738), '*When a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause,* it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.' And *a case arises under the laws of the United States, when it arises out of the implication of the law.*"

And at 215 U. S. 508 the court said:

"The object of the bill was to enjoin alleged unreasonable rates, threatened to be exacted by carriers subject to the act to regulate commerce. The right to be exempt from such unlawful exactions is one protected by the act in question, and the purpose to avail of the benefit of that act, as well as of the anti-trust act, is plainly indicated by the averments of the bill. *Of necessity, in determining the right to the relief prayed for, a construction of the act to regulate commerce was essentially involved.*"

There is a good statement of the rule in an opinion written by the late Chief Justice Taft while sitting in the Circuit Court in Ohio. See

Toledo etc. Ry. Co. v. Pennsylvania Co., 54 Fed. 730 at 732.

"The jurisdiction of this court to hear and decide the case made by the bill cannot be maintained on the ground of the diverse citizenship of the parties * * *. If it exists, it must arise from the subject-matter of the suit. The bill invokes the chancery powers of this

court to protect the complainant in rights which it claims under the act of Congress passed February 4, 1887, * * * known as the 'Interstate commerce act' * * *. These acts were passed by Congress * * * to regulate commerce * * *. *Counsel for defendant Arthur contend that the interstate commerce law and its amendments are only declaratory of the common law,* which gave the same rights to complainant, and that, therefore, this is not a case of federal jurisdiction * * *. *It is immaterial what rights the complaint would have had before the passage of the interstate commerce law. It is sufficient that Congress, in the constitutional exercise of power, has given the positive sanction of federal law to the rights secured in the statute, and any case involving the enforcement of those rights is a case arising under the laws of the United States.''*

The interpretation of a federal statute.

There is a third type of case where a suit filed in a District Court *will necessarily involve the construction or interpretation of an act of Congress.* In a sense, there is an overlap between this situation and the one involving the violation of a duty created by federal law. There is one difference. Jurisdiction exists where it is necessary to construe a federal law, even though, after such construction, *the court may decide that no duty has been imposed.* In short, the jurisdiction does not depend on the outcome of the litigation. It is only necessary to show that the plaintiff has, in good faith, brought a suit where it is necessary to interpret a federal act in order to adjudicate his rights. This theory of jurisdiction takes us back to the principles expressed by Chief Justice Marshall in

Cohens v. Virginia, 6 Wheat. (19 U. S.) 264 at 376-378.

"Jurisdiction is given to the courts of the Union, in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends 'all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority' * * *. If it be, to maintain that a case arising under the constitution, or a law, must be one in which a party comes into court to demand something conferred on him by the constitution or a law, we think, the construction too narrow. *A case in law or equity consists of the right of the one party, as well as of the other, and may be truly said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either.*"

This theory of jurisdiction was discussed in a decision by the late Justice Cardozo. See

Gully v. First National Bank, 299 U. S. 109,

where suit was removed to a federal court because of the alleged need for interpretation of a federal statute. Although the jurisdiction was declined, the opinion shows where the line should properly be drawn. The suit was for recovery of taxes levied by a state, against a national bank located in such state. Congress had given general consent to the levy of such taxes by 12 USCA 548. There was no evidence of any dispute involving the meaning of this section—no indication that there would be *any actual occasion* for its interpretation. The court made this observation in the opinion:

> "The tax here in controversy if valid as a tax at all, was imposed under the authority of a statute of Mississippi. *The federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it* * * *."

In the case at bar we have, of course, a direct charge of the violation of a federal statute—and a claim for damages based upon such violation. The opinion of Justice Cardozo leaves no doubt as to the jurisdiction of such a case:

> "To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action * * *. *The right of immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another* * * *." (299 U. S. 112.)

There are many cases where jurisdiction is recognized because of the necessity of construing a federal statute. See

California Bank v. Kennedy, 167 U. S. 362,

a suit to enforce stockholders' liability in a state bank. One of the defendants was a national bank. There was doubt whether a national association could legally acquire stock in a state bank. There was also doubt as to whether it could be held liable as a shareholder in case such stock was acquired. The decision of that question required an interpretation of federal laws governing its corporate powers. The suit originated in the Superior Court of San Diego County. Thereafter judgment was

reviewed by the Supreme Court of California. The Supreme Court of the United States took the case on writ of error. Such review was sustained because of the federal questions. At 167 U. S. 365-366, the court said:

> "In view of the fact that the defendant was a national bank, deriving its powers from the statutes of the United States, the averment that a particular transaction of the character of the one in question * * * was without authority of law, can, in reason, be construed only to relate to the law controlling and governing the conduct of the corporation, that is, the law of the United States * * *.
>
> "The suggestion as to the want of jurisdiction is, therefore, without merit.
>
> "The federal questions which therefore arise on the record may be thus stated: 1st, do the statutes of the United States * * * relating to the organization and powers of national banks, prohibit them from purchasing or subscribing to the stock of another corporation? And, 2d, if a national bank does not possess such power, can the want of authority be urged by the bank to defeat an attempt to enforce against it the liability of a stockholder?"

There is no difference between the grant of jurisdiction to the Supreme Court under Article III, section 2 of the Constitution, and the power conferred upon a District Court by 28 USCA 41(1) in respect to matters which "arise under the Constitution or laws of the United States".

It has been held that a suit to enforce rights arising from a regulation of a federal reserve bank is within the original jurisdiction of a District Court. See

Federal Reserve Bank of Atlanta v. Atlanta Trust Co., 91 Fed. (2d) 283, 285,

where the court said:

> "* * * the petition declared upon and seeks to enforce rights growing out of a Federal Reserve Bank Regulation promulgated under the authority of federal law. *Such a suit, in the strictest sense, is one arising under the constitution and laws of the United States.*" (91 Fed. (2d) 285.)

Where jurisdiction is acquired because of the necessity of construing or interpreting a federal statute, it *necessarily includes the power to decide that question in favor of either the plaintiff or the defendant.* It may well be that a plaintiff will fail to convince the court or obtain an interpretation of the federal law which will be in his favor. Or, it may be that the defendant will fail in that respect, and that the court will find that the statute prohibits the conduct drawn into question. Jurisdiction includes the power to render a judgment. Necessarily, in this type of case, it cannot be made to depend on the outcome. See

Siler v. Louisville & Nashville RR Co., 213 U. S. 175 at 191,

where the court said:

> "The federal questions, as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the Circuit Court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the federal questions adversely to the party raising them, or even if it

omitted to decide them at all, but decided the case on local or state questions only.

"This court had the same right, and can, if it deem it proper, decide the local questions only, and omit to decide the federal questions, or decide them adversely to the party claiming their benefit."

See also:

The Fair v. Kohler Die Company, 228 U. S. 22, at page 25,

where the court said:

"Of course the party who brings a suit is master to decide what law he will rely upon and therefore does determine whether he will bring a 'suit arising under' the patent or other law of the United States. That question cannot depend upon the answer * * * Conversely, when the plaintiff bases his cause of action upon an act of Congress jurisdiction cannot be defeated by a plea denying the merits of the claim * * * We are speaking of a case where jurisdiction is incident to a federal statutory cause of action. *Jurisdiction is authority to decide the case either way. Unsuccessful as well as successful suits may be brought upon the act, and a decision that a patent is bad, whether on the facts or the law, is as binding as one that is good.* See Fauntleroy v. Lum, 210 U. S. 230, 235. No doubt if it should appear that the plaintiff was not really relying upon the patent law for his alleged rights, or if the claim of right were frivolous, the case might be dismissed. In the former instance the suit would not really and substantially involve a controversy within the jurisdiction of the court, Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 287, 288, and in the

latter the jurisdiction would not be denied, except possibly in form. Deming v. Carlisle Packing Co., 226 U. S. 102, 109. *But if the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad.*"

See also:

Portland Railway Co. v. City of Portland, 210 Fed. 667;

Benedict v. City of New York, 247 Fed. 758;

Freiburg Company v. Dawson, 274 Fed. 420;

Baldwin v. Chicago & Northwestern Railway Co., 86 Fed. 167, at 178.

There is a good summary of the rule in:

Chicago Life Insurance Co. v. Needles, 113 U. S. 574, at 579:

"And our jurisdiction is not defeated, because it may appear, upon examination of this federal question, that the statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a federal nature must, therefore, be denied."

THE RECORD DISCLOSES THAT THE INTERPRETATION OF FEDERAL STATUTES WILL BE NECESSARILY INVOLVED.

All three counts state causes of action which cannot be decided without the interpretation of acts of Congress. The statutes involved are 12 USCA sections 34a, 93, 161, 324, and 501a. The following problems of interpretation are also involved:

1. Whether the Comptroller of the Currency has the power to validate or approve a consolidation agreement so as to validate any infringement of the rights of minority stockholders contained therein.

2. What, if any, presumption of validity, will attach to any such contract because of the fact that it may have been submitted to the Comptroller or considered by him before its execution.

3. Whether 12 USCA 34a is a part of the National Bank Act—whether the committee which drew up the United States Code properly classified the act of February 25, 1927, Chapter 191, 44 Stats. 1225, which was re-enacted as section 34a of Title 12, U. S. Code, making it one of the provisions of the National Bank Act. (That act now appears as Chapter 2 of Title 12.)

4. Whether the general provisions for liability established by 12 USCA 93 apply to a violation of 12 USCA 34a.

The complaints show that all questions involving interpretation of federal law are raised in good faith. We quote the following from the Denicke record:

> "The determination of this action necessarily requires the construction and interpretation of 12 U. S. Code sec. 34a, and the application thereof to the case at bar, in the light of the requirements of due process of law guaranteed to plaintiff under the Fifth Amendment to the Constitution of the United States" (47 R. 33-34).
>
> "As a part of his theory to sustain relief herein, plaintiff contends that said section 34a prohibits the performance of each of the acts and things mentioned * * *" (47 R. 34).

"Defendants, and each of them, rely upon interpretations of these provisions of law which are controverted by plaintiff. An actual controversy exists with respect to the same. The construction relied upon by plaintiff will sustain his cause of action. That which will be urged by defendants will have the effect of diminishing and denying the existence of such claim. The cause of action and a proper determination thereof directly depends upon this fact" (47 R. 35).

"There is no decision of any court of last resort determining the issues raised in this respect and the controversy is therefore actual with respect to each ground relied upon by plaintiff" (47 R. 35).

"The construction which plaintiff relies upon in asserting liability under each of the counts of this complaint is asserted in good faith, upon the advice of counsel, and in the exercise of the bona fide belief that the same is well founded both in law and in fact, and that such liabilities are created in his favor by the statutes and constitutional provisions cited" (47 R. 35-36).

MISCARRIAGE OF JUSTICE RESULTING FROM FAILURE OF THE DISTRICT COURT TO TAKE JURISDICTION OF ALL QUESTIONS DISCLOSED BY THE PLEADINGS.

There can be no reasonable doubt as to jurisdiction. We have shown three independent theories binding upon the District Court. There has been an arbitrary refusal to exercise a jurisdiction which the Constitution and the federal statutes establish. The court failed to perform the duty enjoined by the decisions of the Supreme Court in:

Siler v. Louisville & Nashville RR Co., 213 U. S. 175, at 191;

The Fair v. Kohler Die Company, 228 U. S. 22, at 25;

Chicago Life Insurance Co. v. Needles, 113 U. S. 574, at 579.

It refused to pass upon all questions presented. It arbitrarily declined to determine the common law liability of defendants arising from the set of facts pleaded. We disagree with the conclusions announced upon the matters of federal law, and we are appealing therefrom. However, we have a constitutional right to have the common law issues decided also, because they are a part of the same case—a case which was within the jurisdiction of the District Court.

There has been a miscarriage of justice. If we are now compelled to file new suits in the state courts, defendants will undoubtedly plead the Statute of Limitations. They may be successful in this. Three years from date of discovery may well elapse before the present matters can be determined on appeal.

Defendants will very likely insist that the District Court disposed of the merits. It was under a duty to do so. It failed to perform that duty. Actually it decided the federal questions adversely to appellants, and declined to decide anything else.

On appeal we ask this court to perform the duty which should have been discharged by the district. We request that the following relief be granted:

1. Issuance of a mandate sustaining jurisdiction of the District Court with respect to all questions of federal and state law disclosed by the pleadings;

2. A determination that each count in these pleadings states a good cause of action for damages in violation of federal law;

3. A determination that said counts also state a cause of action for fraud and deceit, independently of the violations of federal statute charged therein;

4. Provisions in the mandate instructing the District Court to deny with prejudice each of the motions to dismiss that are of record here, on the ground that none of them are well taken in view of the allegations set up in the pleadings.

There can be no advantage in limiting the decision to the narrow issue of jurisdiction. It is a part of our burden to show that the judgment is in fact erroneous. We propose to do so by establishing the fact that good causes of action, federal and also non-federal, are stated therein; that the District Court had jurisdiction over both. This Court has all the motions before it. Therefore it is in a position to act. The cause should be remanded in a form which will require defendants to answer. We are in a position to settle the pleadings now. Furthermore, it will aid the lower court to have the benefit of an opinion indicating the theories of liability that are available upon the set of facts pleaded.

CAUSE OF ACTION FOR FRAUD—ASIDE FROM VIOLATIONS OF STATUTES.

We think that the statutes have been directly violated. However, it is unnecessary to sustain the case solely on that ground. These defendants are bank directors. There

was a fiduciary obligation owing from them to Mr. Denicke and Mrs. Doble at the time of the consolidation. See:

Kavanaugh v. Kavanaugh Knitting Co., 123 NE 148, at 151, 226 NY 185,

where the court said:

> "The ordinary trust relation of the directors to the corporation and stockholders is not a matter of statutory law or of technical law. *It springs from the fact that the directors have the control and guidance of the corporate business affairs, and property, and hence of the property interests of the stockholders* * * *
>
> "The relation of the directors to the stockholders is essentially that of trustee and cestui que trust. *The directors are bound by all those rules of conscientiousness, fairness, morality, and honesty in purpose which the law imposes as the guidance for those who are under fiduciary obligations and responsibilities.*"

In the case of a bank director, the relationship is fiduciary in the strictest sense. See:

Fleishhacker v. Blum, 109 Fed. (2d) 543.

Where persons stand in a confidential relationship, suppression of the truth constitutes fraud. One in that position is under a positive duty to speak. Silence on his part is fraud. See:

Civil Code section 1710, sub. 3:

> "A deceit, within the meaning of the last section, is * * * the suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact."

The following cases sustain liability for fraud resulting from silence on the part of a fiduciary:

McDonald v. DeFremery, 168 Cal. 189, at page 203;

Copper Process Co. v. Chicago Bonding & Insurance Co., 262 Fed. 66, at 73.

The promoters of a consolidation occupy a fiduciary relation to stockholders affected by such a proceeding.

Garrett v. Reid-Cashion Land & Cattle Co., 34 Ariz. 245, 270 Pac. 1044;

Jones v. Missouri-Edison Electric Co., 144 Fed. 765, 199 Fed. 64.

The records in the cases now pending disclose an outrageous violation of confidence on the part of Mortimer and Herbert Fleishhacker and the other directors who participated in this merger. We do not believe that Congress licensed such a betrayal of the interests of stockholders when 12 USCA 34a was adopted. It is clear that the common law will not sanction such conduct. There is a cause of action for fraud in addition to the one arising from violation of federal statute.

Knowledge of law.

The defendants said Mr. Denicke and Mrs. Doble could not have been defrauded *because they were presumed to know the law*—hence, *they must have been aware of their legal rights.* It is impossible to throw this presumption into reverse gear and arrive at such a result.

The so-called presumption that one knows the law is merely another way of saying that ignorance of the law

is not an excuse. This means that one may not avoid the consequences imposed by law by pleading ignorance. *The presumption cannot be used to supply a question of fact* which is a material part of a cause of action.

Appellants have been subjected to the consequences imposed by 12 USCA 34a. They have lost their redemption rights because there was no opportunity to exercise them in time. They are in exactly the same position as one who tries to appeal after the time allowed by law. Their case resembles that of a man who is the victim of a default judgment, or of a failure to redeem from a foreclosure, or of a failure to take any other step which by law must be performed within a specified period of time.

We admit that appellants have been subjected to the consequences of a default. This is an action to enforce liability *against the persons who are responsible for that default.* Where one is fraudulently induced to forfeit his legal rights, the wrongdoer may not defend by setting up a presumption. He cannot prove that the injured party knew the law—*when in fact he did not know anything about it.* There is a good statement of the rule at 22 Corpus Juris, "Evidence", pages 148-149:

> "*Knowledge of law.* All persons are presumed to know the general public laws of the country or state where they reside or do business, as well as the legal meaning of terms employed in establishing legal relations. *Since there is no inference of fact that law is known, the presumption merely expresses the rule that ignorance of law is not an excuse for its violation.*"

See:

Murphy v. Sheftel, 121 Cal. App. 533, 9 Pac. (2d) 568.

This was a suit for damage resulting from the defective construction of a building. It was necessary to determine, as a fact, whether plaintiff had knowledge of the building ordinances. The court held that this fact could not be supplied by reference to any presumption.

> "* * * It was shown that certain of the defects mentioned were violative of a state housing law and the building ordinance of the City of San Francisco; and, in view of the rule that ignorance of the law excuses no one—sometimes stated as a presumption that all persons know the law—and the presumption that the law has been obeyed (Code Civ. Proc. Sec. 1963, sub. 33), it is contended that it must be presumed that plaintiff has knowledge of the statute and ordinance mentioned * * *
>
> "* * * where it is necessary to establish the fact of actual knowledge, affirmative proof to that effect must be introduced, and no assistance in so doing can be derived from the pseudo presumption itself * * *"

See also:

Black v. Ward, 27 Mich. 191, 15 Am. Rep. 162, at pages 169, 170.

This case raised the question whether the payee of a promissory note was presumed to know the technical legal meaning of some terms appearing in it. It was held that actual knowledge of that meaning could not be proved by any presumption. The court said:

> "But the maxim referred to in regard to a knowledge of the law is misapplied. No man can avoid a

liability, as a general thing, because he is ignorant of the law. This is an essential rule of society. But *the law is not so senseless as to make absurd presumptions of fact* * * *

"* * * *There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so.* * * * As to the certainty of the law * * * it would be very hard upon the profession if the law was so certain that everybody knew it; *the misfortune is that it is so uncertain that it costs much money to know what it is,* even in the last resort * * *

"In the present case, we are asked not only to presume conclusively that the maker and endorser of the note in suit knew the law, but also that by inserting expressly what the law would have implied, they must be presumed to have meant something else. This would not be a reasonable presumption."

See also:

Municipal Metallic Bed Mfg. Corp. v. Dobbs, 253 N. Y. 313, 171 N. E. 75, 68, ALR 1376.

This case involves the question whether a tenant had knowledge of statutes and ordinances which were violated by conditions existing on the premises. The court refused to apply a presumption of legal knowledge—this issue was left as one of fact to be established by evidence. At 68 ALR 1378, 1379 the court said:

"It is urged that the tenant is presumed to know the law applicable to the facts, and that therefore it cannot rely on the guaranty as to the law applicable to the use of the building. No presumption exists that all men know the law * * * *If ignorance*

of the law did not in fact, exist, we would not have lawyers to advise and courts to decide what the law is. Everyone would know the law and it would be applied uniformly when the facts were known to the parties. * * *"

Damages for fraudulently inducing a forfeiture of legal rights.

The default, imposed upon Mr. Denicke and Mrs. Doble during the consolidation, made it necessary for them to accept shares of depreciated value in the new bank. They have lost their right to sue the bank for the redemption price. There was no option but to keep what was issued to them. The damage resulting from this fraud is the difference in value between the old stock and the new shares issued in exchange. The value of the old stock is measured by what would have been paid in redemption if there had been a demand in time.

Where a fiduciary induces one to forfeit legal rights by a violation of confidence, an action will lie. The rule applies even though the misrepresentation may consist in a *matter of law* as distinguished from a *question of fact.*

See:

Pomeroy's Equity Jurisprudence, 4th Edition, Vol. 2, page 1711, sec. 841,

as follows:

"Mistake of law may be an ignorance or error with respect to some general rules of the municipal law applicable to all persons * * * On the other hand, the term may mean the ignorance or error of a particular person with respect to his own legal rights and interests which are affected by or which will

result from a certain transaction in which he engages * * * The person about to enter into the transaction may be ignorant of or mistaken about his own antecedent existing legal rights and interests which are to be effected by what he does, although he correctly apprehends and fully understands the legal import of the transaction itself * * * or the person may be correctly informed as to his existing legal rights, interests or relations, and may be ignorant or mistaken with respect to the legal import of the transaction in which he engages, and its legal effect upon those rights, interests or relations."

Where ignorance as to the legal effect of a transaction is induced by inequitable conduct of others, there is a right to relief.

See:

Pomeroy, page 1727, section 847,

as follows:

"Whatever be the effect of a mistake pure and simple, there is no doubt that equitable relief, affirmative or defensive, will be granted *when the ignorance or apprehension of a party* concerning the legal effect of a transaction in which he engages, or concerning his own legal rights which are to be affected, *is induced, procured, aided, or accompanied by inequitable conduct of the other parties* * * * The scope and limitations of this doctrine may be summed up in the proposition that a misapprehension of the law by one party, of which the others are aware at the time of entering into the transaction, but which they do not rectify, is a sufficient ground for equitable relief * * *"

Equity will grant relief where such conduct is charged against a fiduciary.

See:

Pomeroy, page 1729, sec. 848,

as follows:

> "A particular application of the foregoing rule requires a special mention. *Where an ignorance or misapprehension of the law, even without any positive incorrect or misleading words* or incidental acts, *occurs in a transaction concerning the trust between two parties* holding close relations of trust and confidence, *injuriously affecting the one who reposes the confidence, equity will, in general, relieve the one who has been injured.*"

See also:

Rued v. Cooper, 119 Cal. 463,

where a customer of a brokerage firm settled his account in ignorance of the fact that he had been led to participate in margin operations in violation of state law, under which he was entitled to claim reimbursement. Upon discovering the fact he sued and was successful. The defendant claimed that the mistake was one of law —that there was no basis for granting relief. At 119 Cal. 467, 468, the court said:

> "The testimony of Mr. Macomber was that nothing was said at or before the settlement as to his right to recover back the money he had advanced; and it was then sought to be shown that he did not know he had such right. The question put for that purpose was objected to upon the ground that it was immaterial—*that he was presumed to know the law.*
>
> "The discussion of the case by counsel is largely devoted to the question as to whether relief can be granted from such mistake • • •

"As to the general rule that mistake of law, pure and simple, is not adequate ground for relief, there is no controversy; nor is there any serious controversy as to the proposition that there are exceptions to that general rule. *We do not, however, regard this as a mistake of law, pure and simple, but as belonging to a distinct class recognized by law writers of acknowledged ability and sanctioned by numerous decisions.*"

The following cases sustain the right to maintain an action for loss or forfeiture of legal rights:

Goodenow v. Ewer, 16 Cal. 461;

Bowman v. Payne, 55 Cal. App. 789;

Douglass v. Todd, 96 Cal. 655.

Civil Code section 1576 provides "Mistake may be either of fact or law". Section 1578 of that code reads as follows:

"Mistake of law constitutes a mistake, within the meaning of this article, only when it arises from:

"1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or,

"2. *A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify.*"

We have already cited section 1710 of this Code under which the suppression of the truth by a fiduciary is declared to constitute a fraud.

Appellants' claims are not barred by the statute of limitations.

It should be sufficient to submit an outline of the authorities bearing on this question.

These causes of action involve a fraud. The limitation period is, therefore, three years, commencing at date of discovery (CCP 338, sub. 4).

Where an action *involving violation of a statute* charges conduct which amounts to fraud, this section applies.

See:

Fox v. Hale & Norcross Co., 108 Cal. 369, at page 424;

MacDonald v. Reich & Lievre, Inc., 281 Pac. 106, 100 Cal. App. 736.

Where the facts necessary to support a cause of action are suppressed by the wrongdoer, the statute is suspended until discovery.

Kimball v. Pacific Gas & Electric Co., 30 Pac. (2d) 39, 220 Cal. 203.

Effect of the decision in National Supply Company v. Stanford University, 134 Fed. (2d) 689.

At page i of the Appendix, we have included a comparison between the consolidation agreement used by National Supply Company and the one adopted by The Anglo. This court will find a striking difference in the procedures adopted.

The relief sought against National Supply Co. amounted to a rescission. The judgment was for the redemption price. *The corporation was sued. The judgment was payable out of the corporate treasury.* The rights of

other stockholders were involved because of this fact. The investing public had an interest in the subject-matter because the corporate structure was necessarily affected by a demand for payment made after the consolidation had become effective. This court seems to have been influenced by those factors.

In the case at bar, the claims involve no one except the directors who were guilty of fraud. The funds of the bank will not be called upon. It is not a defendant. There is no ground under which it could be joined. No other shareholder is involved. The proceeding is one to compel these directors to do justice. They are sued in an individual capacity.

This court seems also to have been influenced by the fact that Stanford University knew that the plan was unfair. After arriving at such conclusion the representatives of the university failed to act. They were furnished with literature sufficient to put them on inquiry. It was held that their claim was barred by laches.

In the cases at bar, *the plan was represented to be a fair one. Appellants believed at the time that it was equitable.* They were justified in going along with the proposal without further inquiry. Their belief was induced by positive misrepresentations. We have pleaded in detail facts showing suppression of these causes of action. The record discloses conduct sufficient to suspend the statute of limitations.

We understand that this court has left open the question whether a failure to give affirmative notice of redemption rights will support action as against a fiduciary.

The Comptroller of the Currency had no power to sanction or validate the fraud.

The conduct of these parties speaks for itself. It is such that no court should be willing to sanction it. Violations of federal statute, and misconduct at common law are both apparent. There is undoubtedly a cause of action. The District Court seems to have assumed, that all of this was a valid exercise of corporate power, *because the Comptroller of the Currency approved of it.*

We have never heard it suggested that all provisions of a corporate charter are valid because the Secretary of State accepts it for filing. All issues of corporate securities are not beyond the reach of the courts because the Division of Corporations may perform some function at the time of execution. The case of the Comptroller is similar.[19]

The fraudulent letters sent to stockholders by Mortimer and Herbert Fleishhacker do not seem to be among the papers "approved" at the Comptroller's office. If there was any approval of this plan beyond the filing of document etc. it was limited to matters concerning the corporate structure. There was no power to validate a fraud perpetrated against the minority.

Condition of the record as to J. C. McKinstry.

Mr. McKinstry, joined as a defendant in both cases, died while motions to dismiss were under submission in the District Court. He was named as appellee herein. There has been no probate. No appointment of an execu-

---

[19]At page iii of the Appendix we have included a summary of the various statutory provisions governing the duties of the Comptroller of the Currency.

tor or administrator whom we could substitute. Appellants have decided not to institute a proceeding of their own to appoint such a representative. As a result there can be no substitution.

Probably no plea of *res adjudicata* could arise in favor of parties based upon our failure to reverse the judgment as to McKinstry. However, we did not wish to incur that risk. Stipulations, therefore, have been signed with opposing counsel and filed herein to cover the matter.[20] These dispense with the necessity of our acting to make a substitution. The appeal is to be decided against all other parties exactly as it would be determined had McKinstry not been joined in the first place.

The court may act on its own motion in clearing the record, as to McKinstry. Presumably, when mandate is issued the court would either affirm judgment, or dismiss appeal as to McKinstry by a provision separate from the action taken with respect to other parties. We will discuss with counsel and the court, at oral argument, the form of mandate which we protect all parties and carry out the intent of our stipulations.

CONCLUSION.

In cases arising under the National Banking Laws, the state and federal courts have concurrent jurisdiction. A plaintiff may elect to sue in either forum. Similarly, a defendant sued in such a matter in the state court may claim federal jurisdiction by petition for removal.

---

[20]For the convenience of the Court we have printed these stipulations in full at pages xiv and xix, of the Appendix.

The fact that a state court has power to try a case, will not deprive the federal court of its own jurisdiction in the matter.

See:

Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278.

The exercise of jurisdiction is *not a discretion—it is a matter of right.* In support of this fundamental principle we cite the opinion of Chief Justice Marshall in *Cohens v. Virginia*, 19 U. S. (6 Wheat.), 264, at 403:

> "It is most true, that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it is brought before us. *We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.*"

Dated, San Francisco,
September 17, 1943.

Respectfully submitted,
AARON M. SARGENT,
Attorney for Appellants.

(Appendix Follows.)

Appendix

ANALYSIS OF 12 U. S. CODE, SECTION 34a.

Language of the Statute.	Remarks.
c. 34a. "Any bank incorporated under the laws any State * * * may be consolidated with a tional banking association located in the same te * * *	*General authority* to consolidate a state bank with national bank.
* * * on such terms and conditions as may be fully agreed upon by a majority of the board directors of each association or bank proposing consolidate * * *	Requires *a lawful contract* —viz: an agreement not in violation of Sec. 34a itself, or of any other provision of law.
* * * and which agreement shall be ratified and nfirmed by the affirmative vote of each such asso- tion or bank owning at least two-thirds of its pital stock outstanding * * *	Procedural — stockholders' approval—⅔ds vote.
* * * at a meeting to be held on the call of the rectors after publishing notice of the time, place, d *object of the meeting* of four consecutive weeks some newspaper of general circulation published the place where the said association or bank is tuated * * *	Published notice—MUST contain statement of the *object* of stockholders' meeting, viz: a true statement of the terms and conditions of the contract.
* * * and after sending such notice to each areholder of record by registered mail at least n days prior to said meeting * * *	Notice of the *object* of stockholders' meeting to be mailed to each.
* * * Upon such a consolidation * * * the cor- rate existence of each of the constituent banks d national banking associations participating in ch consolidation shall be merged into and con- nued in the consolidated national banking asso- ation * * *	General provision for continuance of corporate existence in favor of consolidated bank.
* * * All the rights, franchises, and interests of ch of such constituent banks and national bank- g associations in and to every species of prop- rty, real, personal, and mixed, and choses in action ereto belonging, *shall be deemed to be transferred and vested* in such consolidated national banking	Provision for *automatic succession* to all property and property rights upon completion of consolidation.

Language of the Statute.	Remarks.
association without any deed or other transfer; and such consolidated national banking association, by virtue of such consolidation and *without any order* or other action *on the part of any court* or otherwise, shall hold and enjoy the same and all rights of property, franchises, and interests, including appointments * * * as trustee, executor, administrator * * * in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any such constituent institution at the time of such consolidation * * *	Declares deeds or … struments of co… unnecessary to a… such transfer.
"* * * If such consolidation shall be voted for at said meetings by the necessary majorities of the shareholders of the association and of the State or other bank proposing to consolidate, and thereafter the consolidation shall be approved by the Comptroller of the Currency, any *shareholder* of either the association or the State or other bank so consolidated, *who has voted against such consolidation* at the meeting of the association of which he is a stockholder, *or has given notice in writing* at or prior to such meeting to the presiding officer *that he dissents from the plan of consolidation,* shall be entitled to receive the value of the shares so held by him if and when said consolidation shall be approved by the Comptroller of the Currency * * *	Provides for such … by operation of l… out necessity of co… or other proceedin… firm or establish …
"* * * such value to be ascertained as of the date of the Comptroller's approval by an appraisal made by a committee of three persons, one to be selected by the shareholder, one by the directors of the consolidated association, and the third by the two so chosen * * * (then follow provisions entitling the stockholder to appeal to the Comptroller of the Currency for a reappraisal within five days after notice of the valuation of such committee).	Statutory right … holders to give af… dissent—manner … cise of right to re… of shares.
"* * * and *the value as ascertained* by such appraisal or reappraisal *shall be deemed to be a debt due* and shall be forthwith paid *to said shareholder by said consolidated association,* and the shares so	Manner of condu… praisal of share… necessary dissent …
	Appraised value … to be a *debt* of … solidated bank *pa… rectly to the sto…*

Language of the Statute.	Remarks.
id for shall be surrendered and, after due notice, d at public auction within thirty days * * *	
Where a dissenting shareholder has given notice provided in this section to the bank of which he a shareholder of his dissent from the plan of nsolidation, and the directors thereof fail for re than thirty days thereafter to appoint an ap-aiser of the value of his shares, said shareholder y request the Comptroller of the Currency to point such appraiser to act on the appraisal com-ittee for and on behalf of such bank."	Mandatory procedure against a corporation where it fails to appoint an appraiser.

ANALYSIS OF STATUTES DEFINING POWERS AND DUTIES OF THE COMPTROLLER OF THE CURRENCY.

In general, the office of the Comptroller of the Currency performs functions with respect to the national banks which are similar to the duties imposed by state law upon the Secretary of State and the Division of Corporations, in dealing with domestic concerns.

The Comptroller's office is a bureau in the Treasury Department at Washington. 12 USCA Sec. 1 provides:

> "There shall be in the Department of the Treasury a bureau charged with the execution of all laws passed by Congress relating to the issue and regulation of a national currency secured by United States bonds * * * the chief officer of which bureau shall be called the Comptroller of the Currency and shall perform his duties under the general directions of the Secretary of the Treasury."

Under 12 USCA 21, national banking associations are formed by the execution of articles of association which are to

> "* * * be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office."

Under 12 USCA 22, it is necessary to make an organization certificate; a copy thereof is to be filed in the Comptroller's office (12 USCA 23).

Before a national bank may commence business it is required to obtain a certificate under 12 USCA 27. This procedure is specified to insure the raising of the minimum amount of capital necessary to safe operation of the business. After investigation the Comptroller issues a certificate pursuant to 12 USCA 27.

Where a national bank desires to effect a change of name, it applies for the approval of the Comptroller under 12 USCA 30. This is clearly the performance of a duty corresponding with that vested in the office of the Secretary of State, in the case of domestic corporations.

The Comptroller is the officer who approves the establishment of branch banks under 12 USCA 36.

He is expected to pass upon the sufficiency of the capital and surplus of all banks under his jurisdiction, by virtue of 12 USCA 51. He has jurisdiction over applications for issuance of preferred stock under 12 USCA 51a and 51b. Under 12 USCA 53, he is required to determine that the minimum part of the subscription to capital stock is paid in before commencement of business.

The office of the Comptroller also has jurisdiction over applications for increase of capital and for the reduction of capital—see 12 USCA 57, 58, 59.

In short, the Comptroller of the Currency is a sort of Secretary of State and a Division of Corporations rolled into one—so far as the national banks are concerned. He has certain regulatory powers that are concerned with the structure of national associations. He is granted no power to validate any transaction that may violate the rights of any stockholder or group of stockholders in a bank under his jurisdiction.

Jurisdiction over the consolidation of national banks is conferred by 12 USCA 33; an application by a state bank for leave to become a national bank is governed by 12 USCA 35. In the case at bar, we are concerned with the merger of a state bank into a national bank. The procedure in such case is controlled by 12 USCA 34a. We have abstracted this section in the opening part of this appendix. We will quote here only those parts of the statute which concern the performance of duty by the Comptroller of the Currency. The following are the only powers granted:

1. Approval of consolidation before it may become effective.

> "If such consolidation shall be voted for at said meetings by the necessary majorities of the shareholders of the association and of the State or other bank proposing to consolidate, and thereafter the consolidation shall be approved by the Comptroller of the Currency, any shareholder * * * who has voted against such consolidation * * * shall be entitled to receive the value of the shares so held by him. * * *"

The effective date of a consolidation is governed by the date of the approval given by the Comptroller. This is clear from the following:

> "* * * (such shareholder) * * * shall be entitled to receive the value of the shares so held by him if and *when said consolidation shall be approved by the Comptroller of the Currency*, such value to be ascertained as of the date of the Comptroller's approval by an appraisal * * *"

2. Valuation of assets in case of demand by minority stockholders for appraisal and payment. Provisions to that effect will be found at 12 USCA 34a, pages 108-109.

There is no other term in Section 34a giving the Comptroller the power to do anything. His duty to require a consolidated bank to raise the minimum amount of capital, and to establish a safe corporate structure, seems to arise from the other sections cited.

Consolidation agreement. This is left to the constituent banks. There is no provision for prior approval of any contract by the Comptroller. We quote from the statute:

> "Any bank incorporated under the laws of any State * * * may be consolidated with a national banking association located in the same State * * * on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association or bank proposing to consolidate * * *"

> "* * * which agreement shall be ratified and confirmed by the affirmative vote of the shareholders of each such association or bank owning at least two-thirds of its capital stock outstanding * * *"

Duty of Comptroller is limited to matters concerning sufficiency of the capital structure. The following is the only provision of this Act to indicate any duty which the Comptroller is expected to perform, except in the case of

an appraisal of shares at the request of a minority stockholder:

> "The capital stock of such consolidated association shall not be less than that required under existing law for the organization of a national banking association in the place in which such consolidated association is located."

No doubt the Comptroller would have the right to insist that any violations of law apparent to him be stopped. He might in practice prevent a violation of the rights of minority shareholders. However, this is a very different matter from the point under consideration. *The Comptroller is given no authority* to validate a consolidation plan by sanctioning the violation of legal rights of the minority.

We have the right to go into the merits and decide whether this particular plan does in fact infringe the rights of Ernest H. Denicke and Mary E. Doble. The statute contains nothing to interfere with the power of this court to make a full inquiry.

Although Congress intended the Comptroller to enforce the banking laws—this has not been the practice so far as the Anglo California National Bank and its predecessors are concerned. The record in the case of *Denicke v. Anglo, et al.*, CCA No. 10,329, now pending herein, illustrates the extent to which this obligation has been disregarded.

The Comptroller has no judicial power. His office is a part of the executive branch of our government. There is no right to modify the cause of action which appellants acquired as a result of this merger. We have the right to test this consolidation agreement in the same way that any other contract would be tested in a court of law.

COMPARISON OF CONSOLIDATION AGREEMENT IN NATIONAL SUPPLY CASE WITH CONTRACT OF THE ANGLO MADE EFFECTIVE ON JUNE 30, 1932.

There was a recent decision by this court in the case of *National Supply Co. v. Leland Stanford, Jr. University*, 134 Fed. (2d) 689.

The questions presented in that matter do not parallel the facts in the case at bar. The suit was one brought by Stanford University to compel payment of the redemption price of stock after expiration of the time allowed by statute for the exercise of that right. In effect, plaintiff sought a rescission. Stock was tendered and payment of the value was demanded.

The defendant was the corporation involved in the merger. In case of a recovery its treasury would have been depleted to the extent of the sum allowed for damages. This court held that strict compliance with the statute was necessary in order to maintain such a proceeding. It was also held that the doctrine of laches applied because the plaintiff, Stanford University, had actual notice that the plan was unfair. It neglected to take proper steps after receiving knowledge sufficient to put it on inquiry.

In the case at bar, we have an entirely different kind of a proceeding. The Anglo bank is not joined. No judgment recovered will be payable out of the treasury of that corporation. The defendants are directors who have been guilty of a breach of trust. The action is personal. The corporation is not involved—under our theory of liability it will not be involved.

Our suit assumes that the consolidation is valid so far as the constituent banks and the present bank are con-

cerned. Mr. Denicke and Mrs. Doble each admit that they became stockholders in the Anglo California National Bank of San Francisco as a result of the merger. They do not seek to rescind the transaction. They have retained the stock issued to them under the exchange. Suit is brought to recover the difference in value between the original holdings of these parties and the depreciated stock issued after consolidation. Appellants charge that they were subjected to a default on June 30, 1932. They admit that it is impossible to give a valid demand at this time for the exercise of the minority rights granted by 12 USCA 34a. They acknowledge this fact and sue for the amount of damage which was sustained because of the default. The damages are for a loss of legal rights.

It is apparent that the theory which this court adopted in the National Supply Company matter does not apply.

We are interested in the record in that case for another reason. There are striking differences between the consolidation agreements and literature sent to stockholders in these two cases. We believe it may assist the court if we make a comparison.

Reference to rights of minority stockholders in consolidation agreement. The contract of National Supply Company contains proper reference to the rights of shareholders who give notice of dissent. We quote from the record therein:

> "Article IV. The mode of carrying into effect the consolidation provided in this Agreement and the manner of converting the shares of each of the constituent corporations into shares of the corporation resulting from the consolidation are as follows: * * *

> "As soon as practicable after the effective date of the consolidation, the New Corporation will deliver to holders of certificates * * * of the constituent corporations (in full satisfaction of all rights * * *), *except to those who shall have dissented and demanded the value of their shares* * * * certificates representing * * * (new stock as described)." (10270 R. 106.)

There is a further reference to minority rights in a subsequent part of the same article.

> "* * * provided, however, that upon the effective date of the consolidation the shares of each of the constituent corporations shall automatically be changed and converted into shares of the New Corporation on the basis hereinabove set forth and the holders of shares of each of the constituent corporations shall cease to be holders thereof and shall cease to have any rights thereunder (*except such of them as shall have dissented and demanded the value of their shares as provided by law*) * * *" (10270 R. 109.)

The contract of National Supply Company also includes a provision appointing a process agent to act in proceedings brought for redemption of shares held by minority stockholders.

> "Article VII. The new corporation may be served with process in the State of Delaware in any proceeding for enforcement of any obligation of (National Supply Co.), *including any amount fixed by appraisers as owing to dissenting stockholders* pursuant to the provisions of the applicable laws of the State of Delaware, and shall irrevocably appoint the Secretary of State of the State of Delaware as its agent to accept service of process * * * (in any such proceeding)." (10270 R. 115.)

National Supply Company expressly reserved the right to reject the plan in case of dissent given by more than five per cent of the capital stock outstanding.

> "Article VIII. The Board of Directors of each of the constituent corporations reserves the right, in its uncontrolled discretion, in the event that stockholders holding more than 5% of any class of shares of either of the constituent corporations duly object to this Agreement * * * to abandon and to refrain from making effective the consolidation provided for * * *" (10270 R. 115-116.)

The contract also contained express terms regarding payment of expense incurred in complying with demands for redemption.

> "Article IX. The New Corporation shall pay all expenses of carrying this Agreement * * * into effect and of accomplishing the consolidation, and shall fulfill its liability and *duty to make payment to dissenting stockholders, if any* * * *" (10270 R. 116.)

The contract used by National Supply Company is a model compared to the document which the directors prepared and adopted secretly in accomplishing a consolidation at the Anglo. *The shareholders of National Supply Company each received a copy of the contract.* It was impossible for them to read it without obtaining some knowledge as to their rights. *The Anglo saw fit to hide its contract in the files of the bank.* It was impossible for a stockholder to get any information from this agreement even if he succeeded in locating it.

The Anglo contract affirmatively denies redemption rights, it makes a binding allocation of shares, it contains no clauses for the performance of any duty enjoined by

law in respect to the rights of the minority. *It was a contract which it was necessary for a stockholder to break in order to obtain relief.* There are other important respects in which the record in the National Supply matter differs from the case at bar.

Letter of transmittal calling attention to terms of consolidation agreement. The letter sent to stockholders of National Supply Company included the following provisions sufficient to put all parties on notice.

> "To the stockholders of the National Supply Company of Delaware:
>
> "Enclosed herewith is a notice of a special meeting of the stockholders of your Company, at which a proposal will be presented to consolidate * * * in accordance with the terms of an *Agreement and Joint Plan of Consolidation* dated August 10, 1937, *a copy of which is also enclosed herewith. You are referred to that document* for the full provisions of that agreement, and all references in this letter with respect to those provisions are subject to the detailed statement thereof contained in the agreement itself." (10270 R. 122.)
>
> "You will find attached hereto an *audited balance sheet* * * * together with a pro forma balance sheet showing the financial position of the New Company as of that date *on the basis of the Agreement* and Joint Plan of Consolidation *being approved without dissent.*" (10270 R. 131.)
>
> "* * * the Agreement and Joint Plan of Consolidation reserves the right to the Board to abandon it because of dissent * * *
>
> By order of the Board of Directors,
> John M. Wilson,
> President."
>
> (10270 R. 132.)

The stockholders of Anglo California Trust Company and the Anglo & London Paris National Bank received fraudulent letters signed by Mortimer and Herbert Fleishhacker. *These letters were a substitute for the contract. They were written to tell the shareholders what the consolidation provided for.* There was no reference to a dissent or to any right of dissent. It was impossible for a layman or a lawyer to read the literature and discover anything from it. This was intentional. It was an essential part of the conspiracy.

This court denied relief to Stanford University as against National Supply Company because the University representatives were grossly negligent in failing to read the documents placed in their hands well in advance of the meeting. *In the case at bar, appellants received nothing of value. They were not intended to have anything that would give real information.* Damages are claimed because the duty to furnish such information was not performed, and because the documents that were prepared *affirmatively violated the statute.*

No. 10,347

In the
United States Circuit Court of Appeals
for the Ninth Circuit

Ernest H. Denicke,
Appellant,

vs.

R. D. Brigham, et al.,
Appellees.

STIPULATION

It is hereby stipulated by and between Ernest H. Denicke, the appellant, and R. D. Brigham, Walter E. Buck, R. Stanley Dollar, Herbert Fleishhacker, Mortimer Fleishhacker, Mortimer Fleishhacker, Jr., Walter A. Haas, William F. Humphrey, Samuel Kahn, Joseph Haber, Jr., William B. Reis, Leon Sloss, Jr., Alfred B. Swinerton, and Joseph O. Tobin, appellees, as follows:

That, whereas, this stipulation has been entered into by counsel with reference to the following set of facts:

(1) J. C. McKinstry, who was joined as a party defendant in this action in the District Court, died on February 7, 1942.

(2) Prior to his death, said decedent filed in the District Court a motion to dismiss the above entitled action on the ground of want of federal jurisdiction. Said motion appears at page 67 of the transcript on this appeal.

(3) Said motion, together with similar motions made by the other defendants in said action appearing in this court as appellees, were argued in the District Court on January 12, 1942, and were thereafter submitted for decision.

(4) J. C. McKinstry died while said motions were under submission. The order of the District Court granting defendants' motions to dismiss was made and entered on May 15, 1942. The minute order made and entered that date purports to grant the motion of the said J. C. McKinstry along with similar motions presented by the other appellees.

(5) Notice of appeal was filed on August 12, 1942. J. C. McKinstry has been named as one of the appellees, notwithstanding the fact of his death. No proceedings for administration of the estate of J. C. McKinstry have been initiated, and the parties understand that there may be no probate instituted with respect to said estate. In the absence of a stipulation, it may be necessary or proper for appellant to take certain action in this court suggesting the death of J. C. McKinstry and requesting that this court examine the record and make such ruling with respect to the motion of said McKinstry as may appear proper. Such action may include proceedings calling for the appointment of an executor or administrator of the estate.

(6) The parties desire to avoid the necessity of imposing upon the estate of J. C. McKinstry the burden of any unnecessary expense which might be occasioned in connection with an application for appointment of an executor or administrator. They also desire to define

their legal status with appellant to the extent that this may be affected by the failure to take action for a substitution of representatives in this proceeding to act on behalf of the estate of J. C. McKinstry, deceased.

Now, therefore, it is stipulated as follows:

(1) That appellant shall not be required to institute any proceedings in this court for the purpose of effecting a substitution of record and/or the joinder of any executor or administrator of the estate of J. C. McKinstry, deceased, in connection with this appeal; and that the failure of appellant to take action of that kind will not be relied upon by appellees in connection with any further proceedings in this case.

(2) That the failure of appellant to apply in this court for a reversal of the judgment entered in the District Court on the motion to dismiss filed by J. C. McKinstry shall not be deemed to establish any defense by way of res adjudicata available to any other party joined herein. Appellees, and each of them, expressly covenant and agree that they will not rely upon any act or proceeding of record in this court and/or in the District Court which may concern proceedings taken in this action affecting J. C. McKinstry; and that such defense, if any as appellees might have arising out of such proceedings has been and is hereby expressly waived.

(3) That this stipulation is without prejudice to the rights of all of the parties in all other respects, and that further proceedings in this action are to be adjudicated in the same manner and with the same effect as though J. C. McKinstry had not been joined as a party in the District Court or named as an appellee herein.

(4) This stipulation shall be filed as a part of the proceedings in this appeal.

Dated, May 27, 1943.

Aaron M. Sargent,
Attorney for Appellant.

Thatcher, Jones & Casey,
Attorneys for Appellee,
R. D. Brigham.

Norman A. Eisner,
Attorney for Appellee,
Walter E. Buck.

Brobeck, Phleger & Harrison,
Attorneys for Appellee,
R. Stanley Dollar.

Young, Hudson & Rabinowitz,
Attorneys for Appellee,
Herbert Fleishhacker.

Sullivan, Roche, Johnson
& Farraher,
Attorneys for Appellees,
Mortimer Fleishhacker and
Mortimer Fleishhacker, Jr.

John Parks Davis,
Attorney for Appellee,
Wm. F. Humphrey.

Cyril Appel,
Ivores R. Dains,
Attorneys for Appellee,
Samuel Kahn.

Peirce Coombes,
Attorney for Appellee,
Joseph Haber, Jr.

Willard L. Ellis,
Attorney for Appellee,
Walter A. Haas.

Pillsbury, Madison & Sutro,
Attorneys for Appellee,
Wm. B. Reis,

Lloyd S. Ackerman,
Attorney for Appellee,
Leon Sloss, Jr.

Hartley F. Peart,
Attorney for Appellee,
Alfred B. Swinerton.

Tobin & Tobin,
Attorneys for Appellee,
Joseph O. Tobin.

The foregoing stipulation is hereby approved and made a part of the record of proceedings in the above entitled action.

Dated, May 27, 1943.

Curtis D. Wilbur,
Circuit Judge.

(Endorsed): Filed May 27, 1943. Paul P. O'Brien, Clerk.

No. 10,348

In the
United States Circuit Court of Appeals
for the Ninth Circuit.

Mary E. Doble,
Appellant,
vs.
Walter E. Buck, et al.,
Appellees.

STIPULATION

It is hereby stipulated by and between Mary E. Doble, the appellant, and Walter E. Buck, R. Stanley Dollar, Herbert Fleishhacker, Mortimer Fleishhacker, Walter A. Haas, William F. Humphrey, Alfred B. Swinerton, and Joseph O. Tobin, appellees, as follows:

That, whereas, this stipulation has been entered into by counsel with reference to the following set of facts:

(1) J. C. McKinstry, who was joined as a party defendant in this action in the District Court, died on February 7, 1942.

(2) Prior to his death, said decedent filed in the District Court a motion to dismiss the above entitled action on the ground of want of federal jurisdiction. Said motion appears at page 31 of the transcript on this appeal.

(3) Said motion, together with similar motions made by the other defendants in said action appearing in this court as appellees, were argued in the District Court on

January 12, 1942, and were thereafter submitted for decision.

(4) J. C. McKinstry died while said motions were under submission. The order of the District Court granting defendants' motions to dismiss was made and entered on May 15, 1942. The minute order made and entered that date purports to grant the motion of the said J. C. McKinstry along with similar motions presented by the other appellees.

(5) Notice of appeal was filed on August 12, 1942. J. C. McKinstry has been named as one of the appellees, notwithstanding the fact of his death. No proceedings for administration of the estate of J. C. McKinstry have been initiated, and the parties understand that there may be no probate instituted with respect to said estate. In the absence of a stipulation, it may be necessary or proper for appellant to take certain action in this court suggesting the death of J. C. McKinstry and requesting that this court examine the record and make such ruling with respect to the motion of said McKinstry as may appear proper. Such action may include proceedings calling for the appointment of an executor or administrator of the estate.

(6) The parties desire to avoid the necessity of imposing upon the estate of J. C. McKinstry the burden of any unnecessary expense which might be occasioned in connection with an application for appointment of an executor or administrator. They also desire to define their legal status with appellant to the extent that this may be affected by the failure to take action for a substitution

of representatives in this proceeding to act on behalf of the estate of J. C. McKinstry, deceased.

Now, therefore, it is stipulated as follows:

(1) That appellant shall not be required to institute any proceedings in this court for the purpose of effecting a substitution of record and/or the joinder of any executor or administrator of the estate of J. C. McKinstry, deceased, in connection with this appeal; and that the failure of appellant to take action of that kind will not be relied upon by appellees in connection with any further proceedings in this case.

(2) That the failure of appellant to apply in this court for a reversal of the judgment entered in the District Court on the motion to dismiss filed by J. C. McKinstry shall not be deemed to establish any defense by way of res adjudicata available to any other party joined herein. Appellees, and each of them, expressly covenant and agree that they will not rely upon any act or proceeding of record in this court and/or in the District Court which may concern proceedings taken in this action affecting J. C. McKinstry; and that such defense, if any, as appellees might have arising out of such proceeding, has been and is hereby expressly waived.

(3) That this stipulation is without prejudice to the rights of all of the parties in all other respects, and that further proceedings in this action are to be adjudicated in the same manner and with the same effect as though J. C. McKinstry had not been joined as a party in the District Court or named as an appellee herein.

(4) This stipulation shall be filed as a part of the proceedings in this appeal.

Dated, May 27, 1943.

Aaron M. Sargent,
Attorney for Appellant.

Norman A. Eisner,
Attorney for Appellee,
Walter E. Buck.

Brobeck, Phleger & Harrison,
Attorneys for Appellee,
R. Stanley Dollar.

Young, Hudson & Rabinowitz,
Attorneys for Appellee,
Herbert Fleishhacker.

Sullivan, Roche, Johnson
& Farraher,
Attorneys for Appellee,
Mortimer Fleishhacker.

Willard L. Ellis,
Attorney for Appellee,
Walter A. Haas.

John Parks Davis,
Attorney for Appellee,
Wm. F. Humphrey.

Hartley F. Peart,
Attorney for Appellee,
Alfred B. Swinerton.

Tobin & Tobin,
Attorneys for Appellee,
Joseph O. Tobin.

The foregoing stipulation is hereby approved and made a part of the record of proceedings in the above entitled action.

Dated, May 27, 1943.

Curtis D. Wilbur,
Circuit Judge.

(Endorsed): Filed May 27, 1943. Paul P. O'Brien, Clerk.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

Office - Supreme Court, U. S.
FILED
JUL 29 1944
CHARLES ELMORE CROPLEY
CLERK

No. 196

ERNEST H. DENICKE,

Petitioner,

vs.

R. D. BRIGHAM, WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, MORTIMER FLEISHHACKER, JR., WALTER A. HAAS, WILLIAM F. HUMPHREY, SAMUEL KAHN, J. C. MCKINSTRY, JOSEPH HABER, JR., WILLIAM B. REIS, LEON SLOSS, JR., ALFRED B. SWINERTON and JOSEPH O. TOBIN,

Respondents.

BRIEF OF RESPONDENTS, MORTIMER FLEISHHACKER AND MORTIMER FLEISHHACKER, JR. IN RESPONSE TO PETITIONER'S MOTION TO CORRECT DIMINUTION AND FOR ENLARGEMENT OF RECORD.

THEO. J. ROCHE,
HIRAM W. JOHNSON,
THEO. ROCHE, JR.,
JAMES FARRAHER,
Mills Tower, San Francisco 4, California,
Attorneys for Respondents,
Mortimer Fleishhacker and Mortimer Fleishhacker, Jr.

SULLIVAN, ROCHE, JOHNSON & FARRAHER,
Mills Tower, San Francisco 4, California,
Of Counsel.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 196

ERNEST H. DENICKE,
Petitioner,

vs.

R. D. BRIGHAM, WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, MORTIMER FLEISHHACKER, JR., WALTER A. HAAS, WILLIAM F. HUMPHREY, SAMUEL KAHN, J. C. MCKINSTRY, JOSEPH HABER, JR., WILLIAM B. REIS, LEON SLOSS, JR., ALFRED B. SWINERTON and JOSEPH O. TOBIN,
Respondents.

BRIEF OF RESPONDENTS, MORTIMER FLEISHHACKER AND MORTIMER FLEISHHACKER, JR. IN RESPONSE TO PETITIONER'S MOTION TO CORRECT DIMINUTION AND FOR ENLARGEMENT OF RECORD.

A mere reading of the motion of petitioner to correct diminution and for the enlargement of the records before this court will demonstrate its utter lack of merit, and were it not for the charges made against the Circuit Court of Appeals, 9th Judicial Circuit, and the members and clerk of that court, scant attention would be given by respondents to such motion for the obvious reason that the enlargement of the records if directed by this court can in no manner affect the legal propositions involved in petitioner's application for certiorari.

By his motion, petitioner seeks to have included in the record:

1. The signatures of the three judges of the Circuit Court of Appeals who concurred in the decisions affirming the judgments of the court below; and

2. An inquiry made of counsel for the respective parties during the course of the oral argument by Judge Healy and his statement of the reason for such inquiry, together with the response made thereto by petitioner's counsel and a part of the response made by counsel for respondents.

The reasons for the making of the pending motions as indicated by petitioner require its denial. These reasons briefly stated are as follows:

1. According to petitioner the enlargement is requested for use in an application for certiorari now pending before this court in Case No. 155, October Term 1944, entitled "Ernest H. Denicke, et al., Petitioners v. The Anglo California National Bank of San Francisco, et al., Respondents", which is a controversy entirely separate and

distinct and having no legal connection with the instant controversy. That the records in this case cannot be utilized in the case just referred to is too plain and obvious to require supporting argument.

2. It is next asserted that the Circuit Court of Appeals of the 9th Judicial Circuit has a present membership of six judges and that in order to obtain a rehearing before that court the vote of four judges is essential. It is then stated that the opinion affirming the judgments of the District Court evidences "DELIBERATE refusal to pass upon the questions presented in support of appeal" and because three of the six judges signed such opinions a rehearing by that court would be impossible.

The bare circumstance that three of the six judges signed the opinion subjected to attack is no indication that a petition for rehearing if meritorious would not be granted or that because of such situation the failure to file an application for rehearing is excusable. The records of all appellate tribunals, both federal and state, including this court, furnish ample evidence that rehearings are not uncommon and that the orders granting such rehearings are in most cases signed by the particular judge or judges who rendered the decision sought to be reviewed. The transcript of argument of counsel in the lower court is no part of the record on appeal.

3. That a judge, during an oral argument, may have addressed inquiries to counsel respecting phases of the controversy being heard by the court, or addressed to legal propositions involved in the controversy, is no indication that any doubt that he may have entertained respect-

ing the matters inquired of was not removed by later reflection or by subsequent consideration of the printed briefs. Certainly the decision itself concurred in by such judge is in itself a complete confirmation of the statement just made, as well as a conclusive refutation of the veiled and other charges made by petitioner against the court, principally, however, in the petitions for certiorari and its accompanying points and authorities.

Aside, however, from what has already been stated, which in our opinion demonstrates the motions to be devoid of merit, we submit that they should be promptly denied. Without the slightest justification the motion and accompanying affidavit and brief is implicit with an accusation against the three members of the court who signed the opinion, and its clerk. The charges are amplified and stressed in the petition for certiorari and its accompanying brief as well as in the petition, brief and motion filed in the companion case (*Doble v. Buck, et al.*, No. 197) to which reference is herein made by petitioner. To accuse the clerk of attaching to a record a "false certificate" because the signatures of the judges who signed the opinion certified to this court were omitted in accordance with an unvarying practice long established and pursued, is entirely unjustified. To charge judges of that court, whose sole offence was that of deciding this controversy against petitioner, that they signed an opinion evidencing "deliberate" refusal to pass upon questions raised by petitioner upon his appeal and made statements in such opinion not in accord with the truth, constitutes in our judgment, conduct that, to say the least, is not commendable.

To hold that a court is legally obligated in its opinion to discuss and give therein consideration to every proposition argued by the parties in their briefs, regardless of their importance or merits, and particularly where the controversy is ruled by the determination of an overshadowing and controlling principle or precept which disposes of the whole controversy, would unnecessarily enlarge the duties and tax the patience of the members of our courts beyond human endurance.

It is respectfully submitted that petitioner's motion should be denied.

Dated, San Francisco, California,
July 24, 1944.

THEO. J. ROCHE,
HIRAM W. JOHNSON,
THEO. ROCHE, JR.,
JAMES FARRAHER,
Attorneys for Respondents,
Mortimer Fleishhacker and Mortimer Fleishhacker, Jr.

SULLIVAN, ROCHE, JOHNSON & FARRAHER,
Of Counsel.

(12)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 196

ERNEST H. DENICKE,

Petitioner,

vs.

R. D. BRIGHAM, WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, MORTIMER FLEISHHACKER, JR., WALTER A. HAAS, WILLIAM F. HUMPHREY, SAMUEL KAHN, J. C. MCKINSTRY, JOSEPH HABER, JR., WILLIAM B. REIS, LEON SLOSS, JR., ALFRED B. SWINERTON and JOSEPH O. TOBIN,

Respondents.

BRIEF OF RESPONDENTS, MORTIMER FLEISHHACKER AND MORTIMER FLEISHHACKER, JR.

THEO. J. ROCHE,
HIRAM W. JOHNSON,
THEODORE H. ROCHE,
JAMES FARRAHER,
Mills Tower, San Francisco 4, California,

Attorneys for Respondents,
Mortimer Fleishhacker and Mortimer Fleishhacker, Jr.

SULLIVAN, ROCHE, JOHNSON & FARRAHER,
Mills Tower, San Francisco 4, California,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Page

Petition for certiorari should be denied under Rule 38(b) of this Court 1

Statement of the controversy 2

First count 3

Second count 6

Third count 7

Law argument 9

I.

Exhibits attached to and made a part of petitioner's amended complaint destroy his allegations in which the consolidation proceedings are subjected to attack 9

II.

Allegations of third count respecting false financial statement of Anglo National Bank, and petitioner's reliance thereon were properly disregarded in construing petitioner's pleading 10

III.

Petitioner was charged with knowledge of the law according him right of dissent to the consolidation and, in such event, right to demand appraisement and redemption of his stock 12

IV.

There is no merit in the contention that this cause requires the construction or interpretation of a federal statute 13

V.

Whether a federal question is presented is to be determined from the allegations of fact contained in the complaint, and not from mere assertions or conclusions of the pleader to that effect 14

VI.

A cause of action arises under the laws of the United States only where it appears that it really and substantially involves a controversy as to the effect or construction of the

Page

Constitution or some law or treaty of the United States upon the determination of which the result depends..... 15

VII.

The Fifth Amendment invoked by petitioner has no application, but if it is applicable petitioner's pleadings do not disclose any violation of the due process clause therein 16

VIII.

The action is not one to enforce a liability created by act of Congress so as to afford federal judisdiction on that ground. The gravamen of the actions is merely a fraud cognizable at common law affording no ground for federal jurisdiction 17

IX.

Petitioner's authorities cited in support of his claim of federal jurisdiction inapplicable 20

X.

Irreconcilable antagonism between the two pending actions 21

Conclusion 21

Table of Authorities Cited

Cases	Pages
American Surety Co. v. Siebrecht, 10 F. Supp. 306	19
Atherton v. Anderson, 86 F. (2d) 518	18
Beechwood Securities Corp., Inc. v. Associated Oil Co., et al., 104 F. (2d) 537	12
Benedict v. Price, 38 F. (2d) 309	10
Boatmen's Bank v. Fritzen, 89 Pac. (Kan.) 915, at pp. 917-919	11
Carolina & N. W. Ry. Co. v. Town of Lincolnton, 33 F. (2d) 719	14
Central etc. R. Co. v. Wright, 207 U. S. 127	16
Colonia Drug & Sales Co. v. Western Products Co., 54 F. (2d) 216	14
Corrigan v. Buckley, 271 U. S. 323	15
Cuyahoga River Power Co. v. Northern Ohio etc. Co., 252 U. S. 388, 64 L. Ed. 626	14
Davis v. McFarland, 15 F. (2d) 612	19
Dixie v. Cannon, 32 F. Supp. 626 (affirmed 115 F. (2d) 913)	16
Drummey v. State Bd. of Funeral Directors, 13 Cal. (2d) 75, at 80 and 81	16
Eley v. Gamble, 75 F. (2d) 171	16
Erie R. Co. v. Tompkins, 304 U. S. 64	19
Federal United Corp. v. Havender, 11 Atl. (2d) (Del.) 331	12
Fritzen v. Boatmen's Bank, 212 U. S. 364, 53 L. Ed. 551	11
Gully v. First Nat. Bank, 299 U. S. 109, 81 L. Ed. 70 (decided Nov. 9, 1936)	15
Hare v. Berkenfield, 181 Fed. 825 (8th Cir.)	15
Harney v. Corcoran, 60 Cal. 314	11
Herbert v. Bicknell, 233 U. S. 70	16
Herrmann v. Edwards, 238 U. S. 107, 59 L. Ed. 1224	14,15, 19
Hiatt v. Peddy, 73 F. (2d) 235	16

Page

In re Mooney, 72 Fed. (2d) 503 (9th Circuit)..... 16

Lipka v. Laderer, 259 U. S. 557..... 16
Littleyork Gold Wash. & Water Co. v. Keyes, 96 U. S. 199, 24 L. Ed. 656..... 15
Littrell v. Craig, 1 Fed. Supp. 491..... 12

National Supply Co. v. Leland Stanford Jr. University, 134 F. (2d) 689..... 12
Newburyport Water Co. v. Newburyport, 193 U. S. 561, 48 L. Ed. 793 14

Oxnard Theatres v. Paramount Pictures (S. D. Cal.), 24 F. Supp. 44, 47 19

Peleleas v. Caterpillar Tractor Co., 30 Fed. Supp. 173.... 10
Pickett v. Trixler, 93 F. (2d) 198 (certiorari denied, 303 U. S. 652)..... 12

Ray v. Marion County, 71 F. (2d) 509..... 14
Roach v. Stastny, 104 F. (2d) 559..... 16

St. Paul M. & M. Ry. Co. v. St. Paul & N. P. R. Co., 68 Fed. 2..... 14
Schickler v. Washington Brewery Co., 33 Appeal Cases (Dist. of Columbia)..... 12
Shulthis v. McDougal, 225 U. S. 561, 56 L. Ed. 1205 (1912) 15
Silica Brick Co. v. Winsor, 171 Cal. 18..... 11
Simmons v. Peavy-Welsh Lbr. Co., 113 F. (2d) 812 (C.C. A. 5th Circuit)..... 10

Texas & Pac. R. Co. v. Pottorf, 63 F. (2d) 1..... 12
Tognazzi v. Wilhelm, 6 Cal. (2d) 123..... 11

Viles v. Symes (10th C.C.A.), 129 F. (2d) 828..... 19

Western Union Tel. Co. v. Ann Arbor, 178 U. S. 239, 44 L. Ed. 1052 (1900) 15
Whittemore v. Amoskeag Nat. Bank, 134 U. S. 527, 33 L. Ed. 1002..... 19
Williams v. Joyce, 147 Cal. 151..... 11

Pages

Wright v. City of Pasadena, 37 F. (2d) 902 (District Court, S. D. Cal.) 11
Wright v. Davidson, 181 U. S. 371..... 16

Miscellaneous

Rule 38(b) of Supreme Court of United States..... 2

12 U. S. C. A., Section 34(a)....3, 4, 6, 7, 9, 11, 12, 13, 14, 16, 17,18

In the Supreme Court
OF THE
United States

October Term, 1944

No. 196

Ernest H. Denicke,
Petitioner,

vs.

R. D. Brigham, Walter E. Buck, R. Stanley Dollar, Herbert Fleishhacker, Mortimer Fleishhacker, Mortimer Fleishhacker, Jr., Walter A. Haas, William F. Humphrey, Samuel Kahn, J. C. McKinstry, Joseph Haber, Jr., William B. Reis, Leon Sloss, Jr., Alfred B. Swinerton and Joseph O. Tobin,
Respondents.

BRIEF OF RESPONDENTS, MORTIMER FLEISHHACKER AND MORTIMER FLEISHHACKER, JR.

PETITION FOR CERTIORARI SHOULD BE DENIED UNDER RULE 38(b) OF THIS COURT.

The decision of the Circuit Court of Appeals here subjected to attack is confined solely to the construction placed by it upon petitioner's amended complaint.

A mere reading of the decision of the Circuit Court of Appeals in this controversy will quickly demonstrate that it neither conflicts with any decision of this Court, nor with any decision of another Circuit Court of Appeals on the subject to which it relates, nor does the decision come within any of the other provisions of Rule 38(b) of this Court. In fact, in his pleading petitioner affirmatively alleges:

> "There is no decision of any court of last resort determining the issue in this respect, * * *." (Rec. p. 35.)

Furthermore, an examination of the petitioner's pleading upon which the decision is based will establish that it was not legally susceptible of any construction other than that placed upon it by the Court below. For these reasons alone the pending petition should be denied.

STATEMENT OF THE CONTROVERSY.

The unusual type and structure of the petition filed herein, as well as the unwarranted strictures leveled by petitioner against the Court below and certain of its judges, renders somewhat difficult the task of preparing a brief but adequate response.

As we read the pending petition and its accompanying brief, the principal ground upon which the opinion of the Court below is challenged is because it fails to make mention of certain allegations contained in the Third Count of petitioner's amended complaint wherein it is asserted that the damage claimed to have been sustained by him was due to the alleged publication by the Anglo London

Bank of a false statement of the condition of its capital and surplus, in the belief of the truth of which petitioner asserts he relied.

That the Court below was justified in ignoring these allegations in its construction of such Third Count and in treating that count as asserting no cause of action not pleaded in the First and Second Counts of petitioner's amended complaint, cannot seriously be disputed, and can readily be demonstrated.

While the opinion of the Court below accurately summarizes the gist of the causes of action set up in petitioner's pleading, in order that it may be quickly shown that such allegations of the above mentioned Third Count constitute no material part of the cause of action therein asserted and that in legal effect it was identical with the remaining counts in petitioner's pleading, we believe it necessary to supplement the review of the pleadings set forth in the opinion of the Court below by briefly calling the attention of the Court to some of the controlling allegations appearing in each count of petitioner's amended complaint. In this connection we will also show that no cause of action was, or, in truth, could be based upon the publication of such alleged false financial report and that such allegations in the circumstances here existing were nothing more or less than pure sham which it was the duty of the lower Court to disregard in construing the legal effect of such Third Count.

First Count.

Petitioner's First Count proceeds upon the theory that 12 U. S. C. A., Section 34(a) imposed upon the officers and directors of the two banks proposing to consolidate

the **duty** of **affirmatively** advising the shareholders of each of the banks of the right accorded them by such Section 34(a) to dissent to the plan of consolidation and demand appraisement and redemption of their shares. In support of this theory it is alleged that for the purpose of defrauding such shareholders, including petitioner, respondents failed to perform such duty and refrained from furnishing them with any information respecting such right and that petitioner being **ignorant of, and not knowing that he possessed such right,** failed to dissent to the proposed consolidation. In this connection petitioner also alleged that the notice of the shareholders' meeting was false and fraudulent

> "* * * in failing to advise or notify the shareholders of Anglo Trust Co., including plaintiff, of the fact that the said agreement was in violation of said section, and that there might exist any redemption right independently of the provisions of said agreement." (Rec. p. 12.)

and likewise challenged the agreement itself as being fraudulent because it omitted

> "* * * therefrom all reference to any statutory right or provision which might be employed by shareholders of said bank as a basis of any redemption rights." (Rec. p. 13.)

Inasmuch as the notice to shareholders and the consolidation agreement are attached as exhibits to the pleading they speak for themselves and allegations contra to their contents necessarily were ineffective. In passing, however, we believe it proper to advise the Court that the notice of the shareholders' meeting expressly stated that the meeting was to be held

"* * * for the purpose of considering and determining by vote whether an agreement to consolidate the said bank and The Anglo & London Paris National Bank of San Francisco * * * *under the provisions of the laws of the United States,* shall be ratified and confirmed * * *" (Rec. p. 65.)

Because of the character of the claim thus made by petitioner, he realized that in order to state a cause of action it was essential to show that he **lacked knowledge** of such rights, and accordingly he alleged:

"Said documents constituted the only information which plaintiff ever received in connection with such consolidation proceedings. He acted solely upon this information unlawfully submitted to him in violation of 12 U. S. Code, Sec. 342 (8)." (Rec. pp. 13 and 14.)

"The damages claimed under this count are the result of a loss which plaintiff sustained **through ignorance of his legal rights** in connection with the consolidation proceedings of June 30, 1932, which are above referred to. **Plaintiff did not know and had no means of knowledge of the nature or extent of said rights** because of each of the following facts * * *" (Rec. p. 19, par. XI.)

"Notwithstanding any fiction of law, or technical presumption claimed to arise against him by any construction of 12 U. S. Code, Sec. 34a, *plaintiff did not in fact have any knowledge or means of knowledge of any right or remedy available to him* under said section. * * * *All acts and things which plaintiff did in that behalf were the (14) result of such ignorance on his part.*" (Rec. p. 21.)

It will thus be observed that with respect to this cause of action petitioner positively and unequivocally asserted

that he had no knowledge and was entirely ignorant of his right to dissent from the plan of consolidation and demand appraisement and redemption of his shares.

It must likewise be apparent that if, due to the fiduciary relations existing between petitioner and respondents, it was their duty to furnish petitioner with information respecting such rights, or if they engaged in a conspiracy to conceal such information from him, which is denied, such fraudulent conduct would give rise to a claim at common law and would not be based upon a violation of any federal statute.

Second Count.

In his Second Count petitioner incorporates by reference all of the allegations of Count One. (Rec. p. 24, par. 15.) In the remaining allegations of Count Two petitioner asserts that because he was required to take stock in Anglo California Bank in lieu of his stock in Anglo Trust Company **without having been informed of his legal right to dissent to the plan,** the due process clause of the Fifth Amendment to the Constitution of the United States was violated. (Rec. pp. 24-27.)

The allegations of this Second Count clearly indicate that petitioner's alleged rights to relief thereunder are based upon the erroneous assumption that Section 34(a) imposed upon respondents the *affirmative duty* of advising the shareholders of the respective banks of the existence of such legal rights.

A reading of the lower Court's opinion will undoubtedly convince this Court that it completely covers and properly construes the two counts just mentioned. This brings

us to the Third Count, which petitioner claims was not given separate mention in the lower Court's opinion. That it states no cause of action different than those expressed in Counts One and Two and therefore received proper construction by the lower Court in its opinion which covered the entire pleading, conclusively appears.

Third Count.

In this Third Count petitioner attempts to assert, but ineffectively, the additional claim that between March 1, 1932 and July 1, 1932, the Anglo London Bank published a false and fraudulent statement respecting its capital and surplus; that petitioner acted in reliance upon the belief that such balance sheet as published was true, and that the damages sustained by him were a direct consequence of such publication.

Petitioner, however, again by reference, incorporated in this count ALL of the allegations contained in Count One (Rec. p. 28, par. 19), wherein, as above shown, he avers that the SOLE reason he failed to exercise the said legal rights accorded him by Section 34(a) was because they were UNKNOWN to him, thus making such allegations part of said Count Three, which allegations conclusively establish that it would have been humanly impossible for petitioner to have failed to dissent and demand appraisal and redemption of his stock in reliance upon the alleged false balance sheet.

Furthermore, said Third Count does not state a cause of action based upon said alleged false statement for the reason that it is not asserted therein that petitioner ever read, saw, or heard of said financial statement at any time

prior to the effective date of the consolidation. His sole allegation upon this point is as follows:

> "Plaintiff acted in reliance upon the belief that the balance sheet of Anglo London Bank as published before said consolidation was a true statement thereof." (Rec. p. 33.)

All doubt upon this subject, however, is dispelled by the reading of a portion of paragraph XXVII of petitioner's amended complaint, which is expressly made applicable to ALL of its counts, including the Third Count, wherein petitioner specifically alleges that

> "Plaintiff did not have knowledge of any of the facts set forth in this pleading prior to December, 1938." (Rec. p. 41, par. XXVII.)

which date was more than six years after the consolidation was effected.

It was, therefore, apparent to the lower Court that if, as claimed in ALL of the counts of petitioner's amended pleading, he had no knowledge but, on the contrary, was ignorant of his legal right to dissent from the plan of consolidation and require appraisal and redemption of his shares, which allegations constitute a part of his Third Count, and if, as alleged, petitioner did not have knowledge of any of the facts set forth in his pleading prior to December, 1938, *he could not have made any election in reliance upon the alleged false financial statement.* The two sets of allegations of act referred to are absolutely contradictory and mutually exclusive. To have made both under oath would have at once rendered petitioner guilty of perjury.

This condition of the record necessarily compelled the lower Court to construe petitioner's entire pleading, including the Third Count, as indicated in its opinion. No other construction was legally possible or could legally be imputed to it. It is clearly manifest that such Third Count was added to the amended complaint as a mere afterthought and solely for the purpose of seeking to lend to this action the appearance that it is within federal jurisdiction, which, we submit, it is not.

The contents of the Third Count clearly point out why petitioner's pleading was not verified.

LAW ARGUMENT.

I.

EXHIBITS ATTACHED TO AND MADE A PART OF PETITIONER'S AMENDED COMPLAINT DESTROY HIS ALLEGATIONS IN WHICH THE CONSOLIDATION PROCEEDINGS ARE SUBJECTED TO ATTACK.

In each of the counts of petitioner's pleading the consolidation agreement and the notice of the special meeting of shareholders to consider such agreement are alleged to have been *false* and *fraudulent* and a *violation* of Section 34(a). The consolidation agreement is criticised upon the grounds that by its terms shareholders were *compelled* to exchange their stock for stock in the proposed consolidated bank; that they were *prohibited* from demanding or exercising any optional right to demand or to receive any cash payment for their shares as provided in Section 34(a); that by such contract a *compulsory* allotment of shares in Anglo National Bank was

made the *exclusive* right of petitioner in exchange for his shares in Anglo Trust Company.

In this connection the Court should bear in mind that the consolidation agreement does not become effective unless and until it has been ratified and confirmed by the affirmative vote of the shareholders of each bank owning at least two-thirds of its outstanding capital stock, nor does it affect the rights of any shareholder dissenting from the consolidation.

The consolidation agreement is attached to petitioner's pleading as Exhibit "A" and the notice to shareholders as Exhibit "C". If these two exhibits, and their legal effect, establish, as respondents submit they do, the falsity of petitioner's allegations directed to them, such allegations must be struck down and be entirely disregarded.

Benedict v. Price, 38 F. (2d) 309;

Simmons v. Peavy-Welsh Lbr. Co., 113 F. (2d) 812 (C.C.A. 5th Circuit);

Peleleas v. Caterpillar Tractor Co., 30 Fed. Supp. 173 at 177.

II.

ALLEGATIONS OF THIRD COUNT RESPECTING FALSE FINANCIAL STATEMENT OF ANGLO NATIONAL BANK, AND PETITIONER'S RELIANCE THEREON WERE PROPERLY DISREGARDED IN CONSTRUING PETITIONER'S PLEADING.

The substance of petitioner's Third Count has been heretofore shown (supra pp. 7-9).

Inasmuch as petitioner in all counts of his pleading (including his Third Count) alleges that he had no

knowledge and was ignorant of the provisions of Section 34(a) giving him the right to dissent to the consolidation and demand appraisement and redemption of his stock, and as he had no knowledge of the financial statement referred to until six years after the consolidation was effected, there could not be the slightest causal connection between the alleged fraudulent report and petitioner's failure to dissent, and it is apparent that the irrelevant and sham allegations respecting the false report were alleged only to give the pleading the color of a claim within Federal jurisdiction.

The principle which forms the basis for the contention here made has repeatedly been given recognition by the Courts in cases where permission was refused to file an amended pleading containing allegations inconsistent and irreconcilable with the pleading proposed to be amended.

Wright v. City of Pasadena, 37 F. (2d) 902 (District Court, S. D. Cal.);
Tognazzi v. Wilhelm, 6 Cal. (2d) 123;
Harney v. Corcoran, 60 Cal. 314;
Silica Brick Co. v. Winsor, 171 Cal. 18;
Williams v. Joyce, 147 Cal. 151.

The principle enunciated in the foregoing authorities was approved in,

Boatmen's Bank v. Fritzen, 89 Pac. (Kan.) 915, at pp. 917-919,

where the judgment of the lower Court was reversed upon the ground that the case should have been moved to the Federal Court, which decision was affirmed in,

Fritzen v. Boatmen's Bank, 212 U. S. 364, 53, L. Ed. 551.

III.

PETITIONER WAS CHARGED WITH KNOWLEDGE OF THE LAW ACCORDING HIM RIGHT OF DISSENT TO THE CONSOLIDATION AND, IN SUCH EVENT, RIGHT TO DEMAND APPRAISEMENT AND REDEMPTION OF HIS STOCK.

No duty was imposed upon respondents to advise petitioner of the legal rights afforded him by Section 34(a) entitling him to dissent to the consolidation and, in such event, to demand appraisement and redemption of his shares, for the reason that such rights are conferred upon shareholders by law, and it is an elementary proposition that all shareholders of the consolidated banks were charged with knowledge of the law, including the rights accorded them thereby. This proposition, which is fundamental, has been asserted by the Courts in many cases with respect to various sections of the National Bank Act, with the provisions of which individuals have been held to be charged with knowledge.

Texas & Pac. R. Co. v. Pottorf, 63 F. (2d) 1;

Pickett v. Trixler, 93 F. (2d) 198 (certiorari denied, 303 U. S. 652);

Littrell v. Craig, 1 Fed. Supp. 491;

Beechwood Securities Corp., Inc. v. Associated Oil Co. et al., 104 F. (2d) 537;

National Supply Co. v. Leland Stanford Jr. University, 134 F. (2d) 689;

Schickler v. Washington Brewery Co., 33 Appeal Cases (Dist. of Columbia);

Federal United Corp. v. Havender, 11 Atl. (2d) (Del.) 331.

IV.

THERE IS NO MERIT IN THE CONTENTION THAT THIS CAUSE REQUIRES THE CONSTRUCTION OR INTERPRETATION OF A FEDERAL STATUTE.

Petitioner does not allege that the respondents omitted to perform any of the procedural steps required by the plain directions of Section 34(a); he admits that there was an agreement, approval of it by the boards of directors and ratification by the shareholders. He does not allege that he voted against the consolidation so as to become entitled, as the section provides, to the appraisal of his shares and payment therefor, and in his brief in the Court below it is conceded that he voted for such consolidation. The gist of his complaint is that he did not exercise his rights under the section in the manner in which he now feels he should have exercised them, and that his failure to do so was caused by the alleged fraud practiced on him by respondents. In order to invoke the Federal jurisdiction they argue that the fraud was a violation of some duty owed by respondents by virtue of provisions of Section 34(a) which cannot be found in that section.

There is no language in that section which affords even a remote possibility of the construction which petitioner seeks to have made. The alleged wrong of respondents consisting in preventing petitioner from properly acting under that section was something apart from the provisions and requirements of the section itself. The duty breached by respondents, if any, was a breach of their *common law duty* which did not arise out of Section 34(a) but out of the relationship between the parties, and any action based thereon belongs properly in another

forum. That no precedent is in existence bearing upon such construction of Section 34(a) is readily understandable.

St. Paul M. & M. Ry. Co. v. St. Paul & N. P. R. Co., 68 Fed. 2;

Newburyport Water Co. v. Newburyport, 193 U.S. 561, 48 L. Ed. 793.

V.

WHETHER A FEDERAL QUESTION IS PRESENTED IS TO BE DETERMINED FROM THE ALLEGATIONS OF FACT CONTAINED IN THE COMPLAINT, AND NOT FROM MERE ASSERTIONS OR CONCLUSIONS OF THE PLEADER TO THAT EFFECT.

In any case in which it becomes necessary to determine whether or not a Federal question is involved so as to form a basis for Federal jurisdiction, resort must be made to the factual allegations of the complaint. It is not enough that the existence of a Federal question is iterated by mere assertions of the pleader to that effect, or by allegations amounting to mere conclusions of law. This principle finds expression in many cases, including, among others:

Cuyahoga River Power Co. v. Northern Ohio etc. Co., 252 U. S. 388, 64 L. Ed. 626;

Herrmann v. Edwards, 238 U. S. 107, 59 L. Ed. 1224;

Ray v. Marion County, 71 F. (2d) 509;

Colonia Drug & Sales Co. v. Western Products Co., 54 F. (2d) 216;

Carolina & N. W. Ry. Co. v. Town of Lincolnton, 33 F. (2d) 719.

VI.

A CAUSE OF ACTION ARISES UNDER THE LAWS OF THE UNITED STATES ONLY WHERE IT APPEARS THAT IT REALLY AND SUBSTANTIALLY INVOLVES A CONTROVERSY AS TO THE EFFECT OR CONSTRUCTION OF THE CONSTITUTION OR SOME LAW OR TREATY OF THE UNITED STATES UPON THE DETERMINATION OF WHICH THE RESULT DEPENDS.

It is not only well settled that a mere allegation that the action involves an interpretation of a Federal law is not sufficient to confer jurisdiction on a Federal Court but equally that it must appear from the pleading of plaintiff that there is a *substantial* conflict between plaintiff and defendant as to the meaning, interpretation and construction or effect of one or more of the United States enactments under which the action is brought.

Littleyork Gold Wash. & Water Co. v. Keyes, 96 U. S. 199, 24 L. Ed. 656;

Corrigan v. Buckley, 271 U. S. 323;

Gully v. First Nat. Bank, 299 U. S. 109, 81 L. Ed. 70 (decided Nov. 9, 1936);

Shulthis v. McDougal, 225 U. S. 561, 56 L. Ed. 1205 (1912);

Western Union Tel. Co. v. Ann Arbor, 178 U. S. 239, 44 L. Ed. 1052 (1900);

Herrmann v. Edwards, 238 U. S. 107, 59 L. Ed. 1224 (1915).

A case directly in point is that of

Hare v. Berkenfield, 181 Fed. 825 (8th Cir.).

VII.

THE FIFTH AMENDMENT INVOKED BY PETITIONER HAS NO APPLICATION, BUT IF IT IS APPLICABLE PETITIONER'S PLEADINGS DO NOT DISCLOSE ANY VIOLATION OF THE DUE PROCESS CLAUSE THEREIN.

That the Fifth Amendment is not applicable is pointed out by the decision of the Court below, as well as by the authorities therein cited.

Petitioner's claim in respect to this Constitutional provision is based upon the theory that unless Section 34(a) be construed as claimed by him it is a violation of the Constitutional provisions. That such contention is without merit must be obvious.

The essential elements of due process of law are "reasonable notice and a reasonable opportunity to be heard".

In re Mooney, 72 Fed. (2d) 503 (9th Circuit);
Eley v. Gamble, 75 F. (2d) 171;
Drummey v. State Bd. of Funeral Directors, 13 Cal. (2d) 75, at 80 and 81;
Herbert v. Bicknell, 233 U. S. 70;
Wright v. Davidson, 181 U. S. 371;
Central etc. R. Co. v. Wright, 207 U. S. 127;
Lipka v. Laderer, 259 U. S. 557;
Hiatt v. Peddy, 73 F. (2d) 235;
Dixie v. Cannon, 32 F. Supp. 626 (affirmed 115 F. (2d) 913);
Roach v. Stastny, 104 F. (2d) 559.

That such requirements were fully complied with is clearly apparent.

Section 34(a) *does* provide for notice to the shareholders of the *time, place and object* of the shareholders'

meeting at which ratification of the consolidation agreement is to be sought, which notice must not only be published but also sent to each shareholder by registered mail. It is not denied by petitioner that these statutory requirements were fully complied with. On the contrary, it is directly alleged that all of the procedural steps required by Section 34(a) were taken and that the notice of the meeting referred to the fact that a copy of the agreement was on file at the bank for the inspection of the shareholders if they so desired, and also stated that the consolidation was being effected under the laws of the United States.

VIII.

THE ACTION IS NOT ONE TO ENFORCE A LIABILITY CREATED BY ACT OF CONGRESS SO AS TO AFFORD FEDERAL JURISDICTION ON THAT GROUND. THE GRAVAMEN OF THE ACTIONS IS MERELY A FRAUD COGNIZABLE AT COMMON LAW AFFORDING NO GROUND FOR FEDERAL JURISDICTION.

Stripped of all of its ornamentations and conclusions the action is one to enforce the liability of officers and directors of Anglo Trust Company arising out of their alleged failure to perform *fiduciary* duties claimed to have been owed by them to the shareholders of the two banks participating in the consolidation authorized by Section 34(a).

The mere fact that this controversy involves an asserted liability of directors of a national bank, and of a bank entering into consolidation with it under the terms of the Federal statute, or that both banks may have been members of the Federal Reserve System, and that therefore

certain duties were imposed upon them by the laws of the United States does not in itself bring the matter within the jurisdiction of a Federal Court. All of the defendants were, at the same time, subject to certain duties and responsibilities imposed by the common law, some of which arose out of their fiduciary relation to shareholders by virtue of their office or employment. Thus two sets of duties existed side by side but entirely distinct one from the other, as was pointed out in

Atherton v. Anderson, 86 F. (2d) 518,

in the following language:

> "It is clear that the duty which rests upon directors of a national bank by reason of the provisions of the National Banking Act are entirely separate and distinct from the duties imposed upon them by common law, Yates v. Jones National Bank, 206 U. S. 158, 27 S. Ct. 638, 51 L. Ed. 1002; Jones National Bank v. Yates, 240 U. S. 541, 36 S. Ct. 429, 60 L. Ed. 788, and 'it is obviously possible that a director may neglect one or more of the former, and not any of the latter, or vice versa'. (Bowerman v. Hamner, 250 U. S. 504, 511, 39 S. Ct. 549, 551, 63 L. Ed. 1113) * * *"

Inasmuch as Section 34(a) does not impose upon officers and directors of consolidating banks the duty of informing their respective stockholders of the right to dissent, and inasmuch as such section is not obnoxious to the Fifth Amendment, in view of the allegations contained in petitioner's pleading it necessarily follows that the alleged conspiracy does not violate federal laws, and that as the fraudulent conduct alleged to have been engaged in by respondents is based solely upon the viola-

tion of the fiduciary relations existing between them and petitioner, the causes of action therein are cognizable only in the State Courts and not in Federal tribunals.

This situation is clearly made manifest by many of the allegations contained in petitioner's amended complaint. (Rec. pp. 16; 20-22.)

From an examination of the portions of petitioner's pleading referred to the conclusion is inescapable that the action is merely for damages alleged to have been sustained as a result of the consolidation from which petitioner, by means of the carrying out of an alleged fraudulent conspiracy to conceal and misrepresent the facts involved in the transaction, was induced not to dissent.

That in the absence of diversity of citizenship, the Federal Court has no jurisdiction of such an action based upon a common law liability, is well settled.

Whittemore v. Amoskeag Nat. Bank, 134 U. S. 527, 33 L. Ed. 1002;

Herrmann v. Edwards, 238 U. S. 107, 59 L. Ed. 1224;

Davis v. McFarland, 15 F. (2d) 612;

American Surety Co. v. Siebrecht, 10 F. Supp. 306.

Primarily petitioner's causes of action are based upon an alleged conspiracy to defraud shareholders. Each of these causes of action is, therefore, in tort and such actions have their genesis in local law.

Erie R. Co. v. Tompkins, 304 U. S. 64, 78;

Viles v. Symes (10th C. C. A.), 129 F. (2d) 828, 830;

Oxnard Theatres v. Paramount Pictures (S. D. Cal.), 24 F. Supp. 44, 47.

Moreover, petitioner's references, both in his pleading and in his brief, to various sections of the Civil Code and the Code of Civil Procedure of California clearly show that petitioner recognizes that his right to recover is governed by California law.

IX.

PETITIONER'S AUTHORITIES CITED IN SUPPORT OF HIS CLAIM OF FEDERAL JURISDICTION INAPPLICABLE.

The authorities cited by petitioner directed to this point may be classified into three types.

The first type relates to a cause of action created by a Federal statute. None of these authorities is pertinent for the reasons hereinabove pointed out wherein we have shown that the cause of action pleaded is not one to enforce a liability created by Act of Congress so as to afford Federal jurisdiction on that ground; that no construction or interpretation of a Federal statute is involved, and, furthermore, that the controversy does not really and substantially involve a controversy as to the effect or construction of the Constitution or any of the laws of the United States upon the determination of which its result depends.

The second type of authorities relates to cases wherein a duty is imposed by the provisions of a Federal statute, and its violation is charged. We have heretofore pointed out that the Fifth Amendment is not applicable to a case of this character and, furthermore, assuming its pertinency, nowhere in that Amendment is a duty imposed to which respondents failed to respond.

The third type of authorities involves the interpretation of a Federal statute which is completely answered by the authorities cited by respondents in support of the legal propositions hereinabove asserted by them.

X.

IRRECONCILABLE ANTAGONISM BETWEEN THE TWO PENDING ACTIONS.

While not of importance in this discussion we believe it proper to point out that a clear antagonism also exists between this action and its companion case, Doble v. Buck (No. 197), which, regardless of proofs, would prevent a recovery in both actions. Denicke claims that he sustained damage because the value of the assets in Anglo London Bank was far below the value imputed to them in the consolidation. And yet the Doble complaint proceeds upon the alleged theory that she sustained damage because of the reduced value of the stock issued to her in the consolidated institution as compared with the value of her stock in Anglo London Bank prior to such consolidation. Obviously, one of these claims is lacking in factual basis.

CONCLUSION.

It is respectfully, but with confidence submitted that petitioner's amended complaint does not allege facts showing the existence of a real and substantial controversy as to the construction and interpretation of any law of the United States, nor does it present a cause of action

to enforce a liability created by statute; that, on the contrary, each of the causes of action therein set forth is merely one for breach of duty imposed by the common law and therefore not within Federal jurisdiction; that the decision of the Court below properly construed such pleading, and that therefore petitioner's petition for certiorari should be denied.

Dated, San Francisco, California,
July 24, 1944.

THEO. J. ROCHE,
HIRAM W. JOHNSON,
THEODORE H. ROCHE,
JAMES FARRAHER,
Attorneys for Respondents,
Mortimer Fleishhacker and Mortimer Fleishhacker, Jr.

SULLIVAN, ROCHE, JOHNSON & FARRAHER,
Of Counsel.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 196

Office - Supreme Court, U. S.
FILED
SEP 5 1944
CHARLES ELMORE CROPLEY
CLERK

ERNEST H. DENICKE,
Petitioner,

vs.

R. D. BRIGHAM, WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, MORTIMER FLEISHHACKER, JR., WALTER A. HAAS, WILLIAM F. HUMPHREY, SAMUEL KAHN, J. C. MCKINSTRY, JOSEPH HABER, JR., WILLIAM B. REIS, LEON SLOSS, JR., ALFRED B. SWINERTON, and JOSEPH O. TOBIN,
Respondents.

STATEMENT ON BEHALF OF CERTAIN RESPONDENTS ON SUBMISSION OF PETITION FOR CERTIORARI AND FOR DIMINUTION OF RECORD.

NORMAN A. EISNER,
Mills Building, San Francisco,
Attorney for Respondent, Walter E. Buck.

YOUNG, HUDSON, & RABINOWITZ,
605 Market Street, San Francisco,
Attorneys for Respondent, Herbert Fleishhacker.

WILLARD L. ELLIS,
Russ Building, San Francisco,
Attorney for Respondent, Walter A. Haas.

ROBERT M. SEARLS,
Standard Oil Building, San Francisco,
Attorney for Respondent, William F. Humphrey.

TOBIN & TOBIN,
Hibernia Bank Building, San Francisco,
Attorneys for Respondent, Joseph O. Tobin.

HOWARD HASSARD,
HARTLEY F. PEART,
111 Sutter Street, San Francisco,
Attorneys for Respondent, Alfred B. Swinerton.

PRESS-WALLER PRINTING CO., SAN FRANCISCO, CALIFORNIA

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 196

ERNEST H. DENICKE,
Petitioner,

vs.

R. D. BRIGHAM, WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, MORTIMER FLEISHHACKER, JR., WALTER A. HAAS, WILLIAM F. HUMPHREY, SAMUEL KAHN, J. C. MCKINSTRY, JOSEPH HABER, JR., WILLIAM B. REIS, LEON SLOSS, JR., ALFRED B. SWINERTON, and JOSEPH O. TOBIN,
Respondents.

STATEMENT ON BEHALF OF CERTAIN RESPONDENTS ON SUBMISSION OF PETITION FOR CERTIORARI AND FOR DIMINUTION OF RECORD.

The undersigned counsel for various respondents in the above entitled cause, have examined the brief filed by Theo. J. Roche, Hiram W. Johnson, Theodore H. Roche, James Farraher, as attorneys for respondents Mortimer Fleishhacker and Mortimer Fleishhacker, Jr., in response to the petition for certiorari herein, and also the brief filed by said counsel in behalf of said respondents, in opposition to petitioner's motion to correct diminution and for enlargement of record. In our opinion these briefs contain an excellent and succinct statement of the facts and the law involved in these proceedings. We feel that it would be a needless repetition for us, individually, to reiterate the arguments presented in said briefs and would constitute an undue burden on the time of the Court to read independent briefs containing such reiterated arguments. Therefore, with the approval of said counsel, we adopt the statements and arguments set forth in the said briefs as being applicable to all of the respondents whom we represent, and ask that they be so considered by the Court.

Dated, San Francisco,
August 30, 1944.

Respectfully submitted,

NORMAN A. EISNER,
Attorney for Respondent,
Walter E. Buck.

YOUNG, HUDSON, & RABINOWITZ,
Attorneys for Respondent,
Herbert Fleishhacker.

WILLARD L. ELLIS,
Attorney for Respondent,
Walter A. Haas.

ROBERT M. SEARLS,
Attorney for Respondent,
William F. Humphrey.

TOBIN & TOBIN,
Attorneys for Respondent,
Joseph O. Tobin.

HOWARD HASSARD,
HARTLEY F. PEART,
Attorneys for Respondent,
Alfred B. Swinerton.

In the Supreme Court

OF THE

United States

Office Supreme Court, U. S.
FILED
SEP 25 1944
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1944

ERNEST H. DENICKE, *Petitioner,* vs. R. D. BRIGHAM, WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, MORTIMER FLEISHHACKER, JR., WALTER A. HAAS, WILLIAM F. HUMPHREY, SAMUEL KAHN, J. C. MCKINSTRY, JOSEPH HABER, JR., WILLIAM B. REIS, LEON SLOSS, JR., ALFRED B. SWINERTON and JOSEPH O. TOBIN, *Respondents.*	No. 196
MARY E. DOBLE, *Petitioner,* vs. WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, WALTER A. HAAS, WILLIAM F. HUMPHREY, J. C. MCKINSTRY, ALFRED B. SWINERTON and JOSEPH O. TOBIN, *Respondents.*	No. 197

CONSOLIDATED CLOSING BRIEF ON PETITIONS FOR WRITS OF CERTIORARI.

AARON M. SARGENT,
Hobart Building, San Francisco 4, California,
Attorney for Petitioners.

Subject Index

	Page
Opinions of lower courts	2
Jurisdictional statement	2
Specifications of error	2
Enlargment of record	3
Opinion as printed by clerk	3
Signature clause on original	3
Certificate attached to record	4
Materiality of original opinion	4
Argument on the merits	5
Unlawful agreement	5
False letters in violation of federal law	6
Waiver of rights in advance of meeting	9
Consolidation agreement analyzed	11
Failure of opinion to discuss letters and contract	12
Precedents recognizing federal jurisdiction	13
Liability created by federal statute	17
Failure of opinion to discuss precedents	17
Third count	17
Failure of opinion to discuss third count	20
Jurisdiction extending to entire controversy	20
Failure of opinion to correct refusal of District Court to retain jurisdiction of federal and also non-federal questions in case	21
Constitutional grant of original jurisdiction	22
Judicial code providing for jurisdiction of District Court	22
Precedents recognizing right to trial in federal court	22

Appendix.

Knowledge of law	i
Discussion of respondents' cases	ii
Ignorance of rights—relation to cases	iii
Alleged conflict between Denicke and Doble claims	iv

Table of Authorities Cited

Cases

	Pages
Beachwood Securities Corp. v. Associated Oil Co., 104 Fed. 2d 537	iii
Chesbrough v. Woodworth, 244 US 72	8, 13, 20, 24
Chicago Life Ins. Co. v. Needles, 113 US 574	21, 23
Cohens v. Virginia, 19 US (6 Wheat.) 264 at 378	22
Grand Trunk Ry. v. Lindsay, 233 US 42	14
Home Telephone & Telegraph Co. v. Los Angeles, 227 US 278	22
Jones National Bank v. Yates, 240 US 541	13, 14, 24
Littrell v. Craig, 1 Fed. Supp. 491	iii
Macon Grocery Co. v. Atlantic Coast Line RR Co., 215 US 501	16, 23
National Supply Co. v. Stanford, 134 Fed. 2d 689	iii
Pickett v. Trixler, 93 Fed. 2d 178	iii
Siler v. Louisville & Nashville RR Co., 213 US 175	20, 21, 23
Texas & New Orleans RR Co. v. Brotherhood of Railway & Steamship Clerks, 281 US 548	15
Texas & Pacific Ry. Co. v. Rigsby, 241 US 33	15, 24
Texas Pacific v. Pottorf, 63 Fed. 2d 1	iii
The Fair v. Kohler Die Co., 288 US 22	20, 21, 24
Thomas v. Taylor, 224 US 73	13, 14
Toledo etc. Ry. Co. v. Pennsylvania Co., 54 Fed. 730	16
Wyman v. Wallace, 201 US 230	13, 23
Yates v. Jones National Bank, 206 US 158	13

Codes and Statutes

Constitution of the United States:	
Art. III, Sec. 1	22
Art. III, Sec. 2	22

	Pages
12 USCA 34(a)	8, 9, 12, 17, iii
12 USCA 63	13
12 USCA 93	17, i
12 USCA 161	8, 18
28 USCA 41	22
28 USCA 71	22

Rules

Circuit Court Rule 3	5
Supreme Court Rule 27	2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

ERNEST H. DENICKE,
Petitioner,

vs.

R. D. BRIGHAM, WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, MORTIMER FLEISHHACKER, JR., WALTER A. HAAS, WILLIAM F. HUMPHREY, SAMUEL KAHN, J. C. MCKINSTRY, JOSEPH HABER, JR., WILLIAM B. REIS, LEON SLOSS, JR., ALFRED B. SWINERTON and JOSEPH O. TOBIN,
Respondents.

No. 196

MARY E. DOBLE,
Petitioner,

vs.

WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, WALTER A. HAAS, WILLIAM F. HUMPHREY, J. C. MCKINSTRY, ALFRED B. SWINERTON and JOSEPH O. TOBIN,
Respondents.

No. 197

CONSOLIDATED CLOSING BRIEF ON PETITIONS FOR WRITS OF CERTIORARI.

The certiorari petitions filed in these matters were deemed sufficient to present the questions justifying issuance of writs. For that reason, briefs were not submitted therewith.

Respondents have entered appearances in both proceedings, although their briefs are directed mainly to the case of Denicke v. Brigham, et al., No. 196. In this memorandum we consolidate our reply to the arguments made in both cases. The following statement is submitted in compliance with Rule 27:

Opinions of Lower Courts.

In Denicke v. Brigham, No. 196, the District Court opinion is at R 88—reported at 45 Fed. Supp. 868; Circuit Court opinion is at R 115—reported at 142 Fed. 2d 221.

In Doble v. Buck, No. 197, there was a memorandum opinion at R 76, not reported; the Circuit Court opinion, R 93, is reported at 142 Fed. 2d 225.

Jurisdictional Statement.

This is part of the petition in both cases. (Petition in No. 196 at page 16; petition in No. 197 at page 14.) We adopt those statements herein.

Specifications of Error.

The District Court committed error in refusing to retain jurisdiction of each count of the complaints filed in both of these matters. The Circuit Court arbitrarily refused to correct that error, in violation of precedent. We adopt the following statements from the petitions on file:

No. 196 pages 4-10; 11-14; 16-18.

No. 197 pages 4-16.

Enlargement of Record.

We seek to lay a *complete* record before this Court. There are three exhibits to sustain the motions for enlargement of record:

---

1. **Opinion as printed by Clerk.**

". . . therefore that court had no jurisdiction over the subject matter of the action.
"Judgment affirmed.

(Endorsed): Opinion. Filed Apr. 27, 1944.
Paul P. O'Brien, Clerk."[1]

---

2. **Signature clause on the original.**

". . . therefore that court had no jurisdiction over the subject matter of the action.
"Judgment affirmed.

Clifton Mathews,
United States Circuit Judge
Albert Lee Stephens,
United States Circuit Judge
William Healy,
United States Circuit Judge."

[1]Buck R 97. The same irregularity appears in the printed opinion in No. 196. See Brigham R 123.

3. Certificate attached by Clerk to present record.

"I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and five (105) pages, numbered from and including 1 to and including 105, to be **a full, true and correct copy of the entire record** of the above-entitled case in the said Circuit Court of Appeals, **made pursuant to request of counsel for the appellant,** and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, **as the originals thereof remain on file and appear of record in my office.**

"Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 24th day of May, 1944.

"(Seal) Paul P. O'Brien,
Clerk."[1a]

Materiality.

We seek a writ because the Circuit Court refused to decide the questions laid before it.

We apply directly to this Court because it is impossible to obtain relief in any other way.

That impossibility is the result of a condition within the Circuit Court. It has a present membership of six. A vote of four judges was necessary to grant rehearing.

[1a]Buck R 106, Brigham R 132.

One vote had to come from one of the judges originally assigned.

If these opinions bore only *two signatures*—(a practice permitted by CCA Rule 3)—a third judge would have been available to make up a majority for rehearing in bank. *The absence of that condition is a fact material to our case.*

The other facts are stated at pages 11-13 of the petition in Doble v. Buck, No. 197. This Court has judicial knowledge of all matters disclosed by its files. There are three cases now pending. Each involves the same judges and substantially the same litigants. The records in each, exhibit a similar condition. Those facts speak for themselves.

ARGUMENT ON THE MERITS.

This consolidation could not have been effected without the aid of a federal law. These suits charge violations of the Federal Act under which merger was completed, viz.:

1. **An unlawful agreement.** The terms thereof provide for a compulsory exchange of outstanding shares. The statute permits merger, only,—

> "... on such terms and conditions *as may be lawfully agreed upon* by a majority of the board of directors of each association ..."

No plan could lawfully compel surrender of certificates. No contract could lawfully impede or infringe the free exercise of redemption rights by minority stockholders.

2. **A false letter in violation of federal law.**

Proxies were solicited with the following letter.

"Mortimer Fleishhacker
President

Anglo California Trust Company
Commercial—Savings—Trust
San Francisco

May 25, 1932.

To the Stockholders of
Anglo-California Trust Company:

For some time the executives of your bank, in collaboration with those of The Anglo & London Paris National Bank of San Francisco, devoted themselves to an intensive study of the advantages to be gained from consolidation of the two institutions. These studies revealed unusual possibilities for extension of service to their respective clienteles, large potential savings through the elimination of duplication in head office quarters, equipment, functions and personnel, and a complete absence of competitive effort between interests naturally allied.

These findings were reported to the respective Boards of Directors of the two institutions, and **directions were given to request the necessary examinations by the Comptroller of the Currency** and apply for his preliminary approval of the terms of an agreement for consolidation. Such examination having been completed, and approval of the terms of an agreement for consolidation obtained, **a special meeting of your Board of Directors was held on May 25th, at which formal action was taken, approving and**

executing an agreement of consolidation with The Anglo & London Paris National Bank of San Francisco, and **your President was directed to call a special meeting of the stockholders for June 24th for the purpose of ratifying the action taken.**

The agreement provides:

1. That the consolidation shall be effected under the charter of The Anglo & London Paris National Bank . . . with a change of title . . .

2. That the head office shall be No. 1 Sansome Street . . .

3. It is the further intention, temporarily, to continue the operation of the present head office of The Anglo California Trust Company . . .

4. That the capital shall be $10,400,000.00 consisting of 520,000 shares of a par value of $20.00 per share, **which shall be exchanged** on the basis of four shares of stock of the consolidated bank for each present share of The Anglo & London Paris National Bank, and eight shares for each present share of the Anglo California Trust Company . . .

5. Each of the banks will place in trust all its assets not contributed to the capital funds of the consolidated institution, such trusts to be for the ultimate benefit of the stockholders of the respective institutions . . .

The capital structure was determined upon as that being ample and most serviceable in meeting the requirements of the combined clientele of the two institutions, and as that most adaptable in effecting an equitable exchange of present holdings. **The basis for such exchange, in the unanimous opinion of your Directors and Executives, is eminently fair,** having been arrived at after most careful consideration of

all the factors; there being many common advantages accruing to the benefit of the stockholders of both institutions.

The consolidation agreement having had the unanimous approval of the respective Boards of Directors and Executives, and having been duly executed by them, it is planned to make the consolidation effective as of June 30th, 1932. May we, therefore, ask that you kindly execute and return the enclosed proxy at your earliest convenience, and that you endorse and forward your stock certificates to the Trust Department of Anglo-California Trust Company, as provided in the enclosed form.

Submitted by order of the Board of Directors.
M. Fleishhacker,
President. (Brigham R 60-63.)[2]

Mortimer and Herbert Fleishhacker framed this letter. It was intended to create an erroneous opinion in the minds of stockholders. That letter amounted to a false statement of the *object* of the proposed meeting. It violated the federal law.[3]

That misconduct was affirmative. It was *misfeasance* and not *nonfeasance,* as counsel suggest. There was

---

[2]Stockholders of Anglo & London Paris National Bank received a similar communication. See Herbert Fleishhacker letter at Buck R 62-65.

[3]12 USCA 34(a) provides that ". . . agreement shall be ratified . . . at a meeting . . . after publishing notice of the time, place, and **object of the meeting** . . . and after sending such notice to each shareholder of record . . ."

Obviously, this means a **true statement of the object.** We cite 12 USCA 161, requiring banks to publish condition reports. It is held that such section calls for a true report, and that a violation of that law gives rise to an action. (*Chesbrough v. Woodworth,* 244 US 72.)

specific conduct calculated to infringe and impede the exercise of rights guaranteed by an Act of Congress.[4]

3. **Waiver of rights.** The bank sought to obtain a surrender of stock certificates *in advance of the meeting.* The Mortimer and Herbert Fleishhacker letters are plainly a solicitation for that purpose:

> "May we, therefore, ask that you kindly execute and return the enclosed proxy at your earliest convenience, **and that you endorse and forward your stock certificates** to the Trust Department of Anglo-California Trust Company, **as provided in the enclosed form.**"[5]

The form "enclosed" appears in the record. We include a copy on the next page.

---

[4]12 USCA 34(a) provides: ". . . any shareholder . . . who has voted against such consolidation . . . or has given notice in writing . . . that he dissents . . . shall be entitled to receive the value of the shares so held by him. . . ." (Full text at pp. 2-3 Appendix to Petition in case No. 197.)

This right was infringed by a contract providing for compulsory surrender notwithstanding the statute; by a letter of respondents Fleishhacker representing that stockholders had no such right; and by a solicitation of stock certificates in advance of the meeting.

[5]Extract is from Mortimer Fleishhacker letter at Brigham R 63; a similar provision appears in the Herbert Fleishhacker letter at Buck R 64-65.

"Anglo-California Trust Company,
532 Market Street,
San Francisco, California.

Attention: Trust Department

Gentlemen:

I am enclosing herewith, endorsed in blank, certificates numbered . . . for . . . shares of the capital stock of Anglo-California Trust Company.

The undersigned hereby directs and authorizes you to exchange the enclosed stock for stock of The Anglo California National Bank of San Francisco, a national banking association, upon the basis of eight (8) shares of the stock of the last named bank for one (1) share of stock of Anglo-California Trust Company.

The foregoing exchange is to be made **in accordance with the terms of a certain letter dated the 25th day of May, 1932, addressed to the stockholders of said Anglo-California Trust Company, signed by Mortimer Fleishhacker, President,** and more particularly set out in an agreement entered into between said Anglo-California Trust Company and The Anglo & London Paris National Bank of San Francisco, dated May 25th, 1932.

In the event that such exchange has not been completed on or prior to six (6) months from date hereof, you are to return to the undersigned at the address following the undersigned's signature the enclosed certificate or certificates.

Very truly yours,

.....

Address:

....."

(Brigham R 63-64.)

Consolidation Agreement.

The following provisions are relevant:

"Section 1. The Anglo & London Paris National Bank of San Francisco and Anglo-California Trust Company **are hereby consolidated** . . .[6]

"Section 3. . . . The amount of the capital stock of the consolidated association shall be $10,400,000, divided into 520,000 shares of $20. each . . .[7]

"Section 4. Of the capital of the consolidated association, 400,000 shares **shall be alloted** to the present shareholders of the Anglo & London Paris National Bank of San Francisco, being four shares of $20. par value for each share of $100. par value now held by them, and 120,000 shares **shall be alloted** to the present shareholders of Anglo-California Trust Company, being eight shares of $20. par value for each share of $100 par value now held by them.[8]

"Section 6. . . . All assets of The Anglo & London Paris National Bank of San Francisco and Anglo-

---

[6]Contract was signed by directors of both institutions—to become effective when approved by two-thirds vote. (See Sec. 8.)

[7]Total capital provided was the exact amount needed to accomplish a conversion of the entire capital of both banks. There were no terms defining rights of minority stock or governing disposition of minority shares.

[8]Before merger, the Anglo London Paris Bank had 100,000 shares converted on a 4 to 1 basis into 400,000 shares; Anglo California Trust Co. had 15,000 shares converted on an 8 to 1 basis into 120,000 shares. Those facts appear in Brigham R 7 and in Buck R 6. There was no surplus. The contract contained no provision for surplus stock because all shareholders were required to submit to a conversion.

California Trust Company at date of consolidation shall pass to and vest in the consolidated association . . .[9]

"Section 8. This consolidation shall become effective **when it shall have been ratified and confirmed by the affirmative vote of the shareholders of each of said associations owning at least two-thirds of its capital stock outstanding . . .**"[10]

Circuit Court Opinion.

It was the duty of the Circuit Court to analyze and discuss this contract. That duty was not performed.

It was the duty of that Court to discuss the letters of Mortimer and Herbert Fleishhacker relied on as violations of federal statute. That duty was not performed.

It was the duty of that Court to consider the conduct of the bank in soliciting a surrender of certificates in advance of the meeting. That duty was not performed.

It has become necessary to apply for a writ because of the impossibility of obtaining a decision of those questions in the Circuit Court of Appeals for the Ninth Circuit.

---

[9]This provision was unnecessary. 12 USCA 34(a) provided that ". . . all rights, franchises and interests of each of such constitutent banks . . . in and to every species of property . . . **shall be deemed to be transferred** to and vested in such consolidated national banking association **without any deed or other transfer . . .**"

That section also provided redemption rights for dissenting stock. The bank desired to adopt the terms in its favor which provided for succession to corporate property, and it did not wish to recognize the other terms that were not for its advantage.

The contract exhibits a deliberate acceptance of one provision and a disregard of the other. It would be hard to find more specific evidence of intent to violate the federal law.

[10]Brigham R 56, Buck R 55.

PRECEDENTS RECOGNIZING FEDERAL JURISDICTION.

(1) Chesbrough v. Woodworth, 244 US 72.

Facts: Directors of a national bank were charged with publishing a false condition statement. Damages were sustained because of a failure to readjust that statement to comply with reports issued by the Comptroller of the Currency. Suit was filed in the Federal Court in Michigan. Jurisdiction was challenged. It was sustained in this Court. We quote from the opinion of Justice McKenna:

> ". . . if . . . directors violate or knowingly permit the violation of any of the provisions of the National Bank Act . . . 'every director who participated . . . shall be held liable in his personal and individual capacity . . .'
>
> "This section was considered in Yates v. Jones National Bank, 206 US 158, 179, and it was held that the rule expressed by it is exclusive and precludes a common law liability for fraud and deceit. To the same effect are Thomas v. Taylor, 224 US 73, and Jones National Bank v. Yates, 241 US 541. *Necessarily a federal question is involved and there was jurisdiction in the courts below.*" (244 US 72 at 78.)

(2) Wyman v. Wallace, 201 US 230.

Facts: Suit was filed in a federal circuit court to enforce the stockholder's liability created by Section 5151 of Revised Statutes. (12 USCA 63.) There was no diversity. This Court sustained the jurisdiction of the Circuit Court. We quote from the opinion of Justice Brewer:

> ". . . if diverse citizenship was the sole basis of the jurisdiction of the Circuit Court, the decision of the

Court of Appeals would be final and there would be no appeal to this Court. 26 Stat. 828, Sec. 6. The jurisdiction of the Circuit Court, however, was not invoked on the ground of diverse citizenship—at least, not on that alone. *The case presented was one arising under the laws of the United States. It was a suit to enforce a special right given by those laws.*" (201 US 230 at 241.)

(3) Jones National Bank v. Yates, 240 US 541.

Facts: Depositors of a national bank brought suit against directors for false statements in a condition report. Action was commenced in a state court. This Court granted review from the highest court of the state because of the federal question. The jurisdiction was challenged. We quote from the opinion of Justice Hughes:

"It is insisted that the writs should be dismissed in the view that the plaintiffs in error sought to enforce liability upon non-Federal grounds and that the Federal question was raised exclusively by the defendants in error. But this objection ignores the nature of the plaintiffs' case. The fact that their petitions did not refer, in terms, to the Federal statute is not controlling. Thomas v. Taylor, 224 US 73, 78, 79; Grand Trunk Rwy. v. Lindsay, 233 US 42, 48. It was alleged that statements published by the defendants, acting as directors of the bank, with respect to its financial condition, were false, and were known to be false . . . (240 US 541 at 550.)

"The conclusion of the trial court that there could be a recovery at common law, independent of the Federal statute, did not alter the inherent character of the actions . . . (240 US 541 at 550.)

"If the plaintiffs' cause of action required the application of the Federal statute in defining the liability of these directors with respect to the acts alleged and proved, the plaintiffs were entitled to its correct application . . . We conclude that this court has jurisdiction." (240 US 541 at 551.)

(4) Texas & Pacific Railway Company v. Rigsby, 241 US 33.

Facts: Suit was brought under the Federal Safety Appliance Act to recover for injuries sustained by a switchman employed in interstate commerce. The federal law contained no provision to prescribe a penalty for violations. On this ground, defendant denied the existence of a federal cause of action. A writ issued to the Fifth Circuit. We quote from the opinion of Justice Pitney:

"A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages . . . is implied . . .

"Plaintiff's injury was directly attributable to a defect in an appliance which by the 1910 amendment was required to be secure, and the Act must therefore be deemed to create a liability in his favor . . ." (241 US 33 at 39-40.)

(5) Texas & New Orleans Railroad Company v. Brotherhood of Railway & Steamship Clerks, 281 US 548.

Facts: This was a suit to enjoin violations of the Railway Act of 1926. Defendant claimed that penalties in the law did not include injunctive relief and that there was

no federal liability. A writ issued to the Fifth Circuit. We quote from the opinion of Chief Justice Hughes:

> "The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided. In the case of the statute in question, there is an absence of penalty, in the sense of specially prescribed punishment . . . but in each case a legal obligation is created . . ." (281 US 548 at 569.)

(6) Macon Grocery Co. v. Atlantic Coast Line RR. Co., 215 US 501.

Facts: Shippers sued to enjoin enforcement of a tariff schedule alleged to violate federal law. Held that the suit arose under the laws of the United States and that the lower court had original jurisdiction. A writ issued to the Fifth Circuit. We quote from the opinion of Justice White:

> "We are of opinion that the case before us may properly be said to be one arising under a law or laws of the United States. As said by Taft, Circuit Judge, in Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co. et al., 54 Fed. Rep. 730:
>
> " 'It is immaterial what rights the complainant would have had before the passage of the Interstate Commerce Law. It is sufficient that Congress, in the constitutional exercise of power, has given the positive sanction of federal law to the rights secured in the statute, and any case involving the enforcement of those rights is a case arising under the laws of the United States.' " (215 US 501 at 507-508.)

LIABILITY CREATED BY FEDERAL STATUTE.

Section 34(a) is part of the National Bank Act. Directors are made expressly liable for violations thereof:

> ". . . in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation." (12 USCA Sec. 93.)

The directors of both banks were responsible. They were parties to the contract. The false letters issued by Mortimer and Herbert Fleishhacker were submitted at their request.[11]

Circuit Court Opinion.

It was the duty of the Circuit Court to analyze and discuss these cases. It was the duty of that Court to either follow these precedents, or distinguish the rules therein expressed. That duty was not performed.

It has become necessary to obtain compliance, by an application for certiorari.

THIRD COUNT.

In *Denicke v. Brigham et al.*, No. 196, there is a further ground to sustain original jurisdiction in the District Court. Before the merger, the Anglo & London Paris

---

[11]Letters to stockholders include a signature clause which states that same are "Submitted by order of the Board of Directors",—Brigham R 63; Buck R 65.

National Bank published a false condition statement in violation of 12 USCA 161. It is clear that any damage resulting from that conduct will support an action, and that the cause of action is federal. (*Chesbrough v. Woodworth,* 244 US 72.)

The Denicke complaint contains charges which bring the case squarely within the rule. He alleges that he,—

> ". . . **acted in reliance upon the belief that the balance sheet . . . was a true statement . . .**" (R. 33.)

He also alleges that,—

> "**The damages which he sustained . . . are the direct consequence of the publication of an untrue condition report . . .**" (R. 33.)

The Circuit Court had no right to disregard that charge. Respondents are bound thereby, and by the conclusion of jurisdiction which necessarily follows. They seek to avoid this result by resort to a technicality. We summarize that contention:

To meet a defense based on laches, the Denicke complaint contains a statement showing how and when these claims were discovered. (Par. XVII R 41-45.) Respondents have seized upon a single sentence which they now lift out of this paragraph to support a technicality. We quote that sentence:

> "Plaintiff did not have knowledge of any of the facts set forth in this pleading prior to December, 1938." (R. 41.)

Counsel then draw an absurd and unnecessary conclusion:

> ". . . if, as alleged, petitioner did not have knowledge of any of the facts . . . he could not have made

any election in reliance upon the alleged false financial statement."[11a]

This far fetched argument was never made until counsel filed a reply brief in the Circuit Court. If that suggestion had been made in the District Court, our statement would have been corrected by amendment. We apply for issuance of a mandate which will protect our right to make that correction, if deemed necessary to confirm jurisdiction.[11b]

There is no conflict on the merits. Mr. Denicke was the victim of the false literature sent to him in violation of the Act of Consolidation. He relied on the balance sheet and upon the material furnished to him. He alleges that reliance. This includes, necessarily, the statement that he read it.

If Denicke had been aware of his rights, or if he had been aware of the false character of this balance sheet —before the meeting—he would, in ignorance, have done the precise thing required to protect his rights. *He would have appeared at the meeting in protest, and voted against*

[11a]Brief of Sullivan, Roche & Johnson p. 8.

[11b]This sentence cannot be separated from the context. The Court is requested to read the whole of par. XXVII R 41-45. The matter quoted was by way of introduction to the statements that follow—included to meet any defense of laches. We show how and when these claims were discovered; that plaintiff's first knowledge came from a study of balance sheets during a recapitalization effected in Dec. 1938; that Denicke then requested his auditor to go into the merger of June 30, 1932; that a $6,500,000 shrinkage was uncovered; and that Denicke then obtained an opinion of counsel. There is no real conflict. If there is any technicality, it is one which can and should be cleared by amendment.

the plan. His damages are the direct result of that situation.

Circuit Court Opinion.

It was the duty of the Circuit Court to analyze and discuss the third count of the Denicke complaint, and to apply the rule in *Chesbrough v. Woodworth,* to the facts there presented.

That duty was not performed.

It has become necessary to obtain compliance, by an application for certiorari.

Jurisdiction Extends to the Entire Controversy.

Where jurisdiction attaches because of a federal question, the District Court is bound to retain control over the entire controversy. Non-federal as well as federal questions must be decided. This principle is also established by precedent.

(1) Siler v. Louisville & Nashville RR Co., 213 US 175 at 191.

> "The federal questions . . . gave the Circuit Court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the federal questions adversely to the party raising them, or even if it omitted to decide them at all . . ."

(2) The Fair v. Kohler Die Co., 228 US 22 at 25.

> "Jurisdiction is authority to decide the case either way. Unsuccessful as well as successful suits may be brought upon the act . . . if the plaintiff really makes a substantial claim under an Act of Congress

there is jurisdiction whether the claim ultimately be held good or bad."

(3) Chicago Life Insurance Co. v. Needles, 113 US 574 at 579.

"And our jurisdiction is not defeated, because it may appear, upon examination of this federal question, that the statutes . . . are not repugnant . . . Such an examination itself involves the exercise of jurisdiction."

Non-federal Questions.

Petitioners Denicke and Doble each plead, in good faith, causes of action involving violations of federal statute. Those violations are an essential ingredient of the cause of action in each instance. It so happens that the pleadings also disclose violations of fiduciary duty sufficient to sustain actions at common law.

It was the duty of the District Court to retain jurisdiction of the entire case. A miscarriage of justice has resulted from a failure to discharge that responsibility.

Circuit Court Opinion.

It was the duty of the Circuit Court to correct that error. That duty was not performed.

In order to obtain compliance with the principles announced in *Siler v. Louisville etc. Co.*, 213 US 175; *Chicago Ins. Co. v. Needles*, 113 US 574; and *Fair v. Kohler*, 228 US 22, it has become necessary to apply for a writ of certiorari.

THE CONSTITUTION.

"The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish . . ." (Art. III, Sec. 1.)

"*The judicial power shall extend to all cases,* in law and equity, *arising under this Constitution, the laws of the United States . . .*" (Art. III, Sec. 2.)

JUDICIAL CODE.

"*The District Courts shall have original jurisdiction . . . of all suits* of a civil nature, at common law or in equity . . . *where the matter* in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, *and arises under the Constitution or laws of the United States . . .*" (28 USCA 41.)[12]

PRECEDENT.

February 1821—Chief Justice Marshall.

"A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either."[13]

---

[12]Where a case arises under federal law, the federal and state courts have concurrent jurisdiction (*Home Telephone & Telegraph Co. v. Los Angeles,* 227 US 278). Plaintiff is entitled to select the federal court. Defendant may remove to that court under 28 USCA 71.

[13]*Cohens v. Virginia,* 19 US (6 Wheat.) 264 at 378.

March 2, 1885—Justice Harlan.

". . . jurisdiction is not defeated because it may appear, upon examination of this federal question, that the statutes . . . are not repugnant."[14]

April 2, 1906—Justice Brewer.

"The case presented was one arising under the laws of the United States. It was a suit to enforce a special right given by those laws."[15]

April 5, 1909—Justice Peckham.

"The federal questions . . . gave the Circuit Court jurisdiction . . . that court had the right to decide all the questions in the case."[16]

January 17, 1910—Justice White

"Cases arising under the laws of the United States are such as grow out of the legislation of Congress."[17]

March 24, 1913—Justice Holmes.

"Jurisdiction is authority to decide the case either way. Unsuccessful as well as successful suits may be brought upon the act . . . if the plaintiff really makes

---

[14] *Chicago Life Insurance Co. v. Needles*, 113 US 574 at 579.
[15] *Wyman v. Wallace*, 201 US 230 at 241.
[16] *Siler v. Louisville & Nashville RR Co.*, 213 US 175 at 191.
[17] *Macon Grocery Co. v. Atlantic Coast Line RR Co.*, 215 US 501 at 507.

a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad."[18]

April 3, 1916—Justice Hughes.

". . . the question upon the case made by the plaintiffs was essentially one as to the liability of these directors for conduct governed by the Federal Act. The conclusion of the trial court that there could be a recovery at common law, independent of the Federal statute, did not alter the inherent character of the actions."[19]

April 17, 1916—Justice Pitney.

An action for violation of a duty imposed by a federal statute—arises under the provisions thereof.[20]

May 21, 1917—Justice McKenna.

An action for publication of an untrue condition statement of a national bank is federal.

"Necessarily a federal question is involved . . . There was jurisdiction in the courts below."[21]

---

[18]*The Fair v. Kohler Die Co.*, 228 US 22 at 25.
[19]*Jones National Bank v. Yates*, 240 US 541 at 550.
[20]*Texas & Pacific Ry. Co. v. Rigsby*, 241 US 33 at 39.
[21]*Chesbrough v. Woodworth*, 244 US 72 at 78.

Under Section 240 of the Judicial Code, we apply for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
September 22, 1944.

Respectfully submitted,

AARON M. SARGENT,

Attorney for Petitioners.

(Appendix Follows.)

Appendix

We present herewith our reply to the arguments of counsel not covered by the foregoing.

Knowledge of Law.

We quote from page 12 of the Fleishhacker brief:

> ". . . it is an elementary proposition that all shareholders of the consolidated banks *were charged with knowledge of the law, including the rights accorded them thereby.*"

There is a general presumption that "all persons know the law". This means that ignorance of the law is no defense.

Counsel seek to apply this presumption in reverse. They use it to supply a fact which does not exist. *Mr. Denicke and Mrs. Doble were in fact ignorant regarding the nature and extent of their right of redemption.* They were subjected to a forfeiture imposed by federal law. They became shareholders in the consolidated bank by a failure to exercise redemption rights.

This suit is to recover damages resulting from that forfeiture. The defendants are directors responsible. They induced that forfeiture. At pages 17-20 of the appendix to our petition in Doble v. Buck, No. 197, we cite authority to sustain such an action.

The cause of action is federal. Directors are prohibited from violating the National Bank Act. They are liable for damages resulting from such violations (12 US CA 93).

In denying liability, respondents raise other questions which are also federal, viz.:

1. Whether a stockholder who has been subjected to a forfeiture of the redemption right granted by 12 USCA 34(a), can sue directors guilty of inducing that forfeiture by conduct in violation of federal statute.

2. Whether this section prevents such shareholder from pleading ignorance—where such ignorance is a fact, and the damage sustained is the result?

3. Whether Congress, in enacting this section, intended to create any presumption which would prevent a shareholder from making that plea?

We plead a cause of action based on this theory. We allege ignorance, *as a fact*. We deny the right of these directors to avoid responsibility by seeking shelter in a legal presumption.

Respondents are compelled to take an opposite view. These questions can only be answered by an interpretation of the federal law. Necessarily there was original jurisdiction in the District Court.

Respondents' Cases.

Counsel cite a number of federal cases holding that ignorance will not relieve a party of the consequences imposed by a statute. There is no doubt regarding the correctness of that principle. However, it has no present application.

Under 12 USCA 34(a), a failure to act resulted in the imposition of a penalty, namely, a forfeiture of redemption rights. These suits are brought to recover damages based on that forfeiture. We admit that it occurred. We acknowledge that the consolidation has become a fact. Our charges involve individuals and not the corporation. Respondents' cases may all be distinguished on this ground.[22]

Ignorance of Rights—Relation to Case.

We charge violations of federal statute that are affirmative. The documents evidencing these overt acts are attached to the pleadings.

Counsel seek to divert attention from that fact by suggesting that this case rests upon ignorance of the law.

Ignorance is an element of the case for one reason only. It is clear that no damage could have resulted from this

---

[22]*Texas Pacific v. Pottorf*, 63 Fed. 2d 1, holds that a bank deposit is subject to federal regulations regardless of intent of parties; *Pickett v. Trixler*, 93 Fed. 2d 178, holds that contract in conflict with federal law involving bank receivership will be set aside; *Littrell v. Craig*, 1 Fed. Supp. 491, holds that by failure to dissent, a stockholder became automatically the holder of shares in a bank formed by merger, with stockholders' liability for the obligations thereof. Case does not involve claim for damages against directors, nor is there any charge that loss of rights was occasioned by conduct of any officer of any bank affected; *Beechwood Securities Corp. v. Associated Oil*, 104 Fed. 2d 537, holds that a stockholder who lost redemption rights could not ordinarily follow his investment for the purpose of setting aside a merger. We have not attacked the consolidation. We accept it and sue for the damage. A totally different question is presented. *National Supply Co. v. Stanford*, 134 Fed. 2d 689, is similar. The stockholder sued the new corporation for a return of his capital. We refrain from taking action that will involve the corporate structure. Only individuals are charged with liability.

conduct if petitioners had been aware of their rights. Ignorance was pleaded to meet that defense.

The conduct which violated the federal law was positive and affirmative. The overt acts have been specified.

Alleged Conflict between Denicke and Doble Claims.

Mr. Denicke sued to recover the difference between the balance sheet value of Anglo California Trust Co. before merger, and the actual market value of the stock received when the plan became effective. Our investigation indicates that this prior value was the true worth of that stock.

Mrs. Doble held shares in the Anglo & London Paris National Bank—the other institution participating in this plan. One shareholder of that bank discovered the fraud in time. He demanded redemption and was paid the sum claimed by Mrs. Doble. The substandard assets in that bank amounted to millions of dollars. A secret trust was created to contain these depreciated items. The contract provides for that trust to continue for five years after merger.[23] There has never been an accounting. The "securities" and other property going into that "trust" disappeared like water running into the sands of the desert. These defendants have refused to permit an accounting. It may be that subsequent misconduct involving that trust will explain a part of Mrs. Doble's loss.

It is entirely possible for stockholders of both banks to have an action as a result of this merger. The directors'

---

[23]See Contract Sec. 6—Buck R 51-54; Brigham R 52-55.

liability was an asset of the bank which published a false statement. Substantial recovery on that liability might have brought the value up to something like the figure carried on the books.

Clearly Mr. Denicke sustained a loss in being drawn into that situation. It does not lie with respondents or their counsel to suggest any conflict or inconsistency in these claims, where they are themselves responsible for a refusal to permit an audit.[24]

[24] "* * * plaintiff was hampered from further investigation by Chickering & Gregory who sought to impede his efforts and to prevent him from getting at additional facts (Brigham R 43).

FILED
NOV 3 1944
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 196

ERNEST H. DENICKE,
Petitioner,

vs.

R. D. BRIGHAM, WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, MORTIMER FLEISHHACKER, JR., WALTER A. HAAS, WILLIAM F. HUMPHREY, SAMUEL KAHN, J. C. McKINSTRY, JOSEPH HABER, JR., WILLIAM B. REIS, LEON SLOSS, JR., ALFRED B. SWINERTON and JOSEPH O. TOBIN,
Respondents.

PETITION FOR REHEARING AND FOR RELIEF UNDER JUDICIAL CODE SECTION 240.

AARON M. SARGENT,
Hobart Building, San Francisco 4, California,
Attorney for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Table of Contents

	Page
Petition for rehearing	2
Application for summary relief to compel Circuit Court to pass on jurisdiction under Third Count	2
Opinion suppressing reference to that count	3
Application for summary relief to enforce right to original jurisdiction in accordance with precedent	3
Decisions of this Court violated by action of Circuit Court	4
Federal Law supreme under the Constitution	5
Nature of the judicial function	6
Process available for summary relief	7

Table of Authorities Cited

Cases

	Pages
California Bank v. Kennedy, 167 US 362	4
Chesbrough v. Woodworth, 244 US 72	3, 4
Chicago Life Ins. Co. v. Needles, 113 US 574	4
Cohens v. Virginia, 19 US (6 Wheat.) 264 at 403	4, 6
Jones National Bank v. Yates, 240 US 541	4
Macon Grocery Co. v. Atlantic Coast Line RR Co., 215 US 501	4
Siler v. Louisville & Nashville RR Co., 213 US 175	4
Texas & New Orleans RR Co. v. Brotherhood of Ry. & Steamship Clerks, 281 US 548	4
Texas & Pacific Ry. Co. v. Rigsby, 241 US 33	4
The Fair v. Kohler Die Co., 228 US 22	4
Wyman v. Wallace, 201 US 230	4

Statutes

Judicial Code:	
Section 24	4, 5
Section 240	3, 6
United States Constitution:	
Article III, Sections 1 and 2	4, 5
Article VI	4, 6
Amendment V	4, 6
28 USCA 41	4

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 196

ERNEST H. DENICKE,

Petitioner,

vs.

R. D. BRIGHAM, WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, MORTIMER FLEISHHACKER, JR., WALTER A. HAAS, WILLIAM F. HUMPHREY, SAMUEL KAHN, J. C. MCKINSTRY, JOSEPH HABER, JR., WILLIAM B. REIS, LEON SLOSS, JR., ALFRED B. SWINERTON and JOSEPH O. TOBIN,

Respondents.

PETITION FOR REHEARING AND FOR RELIEF UNDER JUDICIAL CODE SECTION 240.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Owen J. Roberts, Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson and Wiley Rutledge, Associate Justices of the Supreme Court of the United States:

Ernest H. Denicke, the petitioner above named, hereby applies to this Court for a rehearing and reconsideration of the order entered October 9, 1944, denying application for writ of certiorari.

First ground.

Petitioner applies for summary relief and for the issuance of appropriate process to compel the Circuit Court of Appeals for the Ninth Circuit to render a decision and to prepare and file an opinion in writing disclosing the action of said Court upon the following question of law upon which such Court failed and refused to pronounce judgment:

> *Whether the third count of petitioner's complaint presents a cause of action arising under federal law, within the jurisdiction of the United States District Court, for the Northern District of California.*

Wilful Refusal to Pronounce Judgment.

During oral argument of this matter, Circuit Judge Healy made the following statement from the bench:

> *"The third count in this case is the one that gives me difficulty. I will confess that, I do not know about my associates. Neither of you has satisfied me that it does or does not state a cause of action that is cognizable by a Federal Court."*

This statement is part of the transcript on oral argument, on file as part of the records of the Circuit Court. Same appears at page 11 of the affidavit filed in this Court in support of motion for enlargement of record.

The third count of petitioner's complaint appears at R 28-33. It is impossible to ascertain from the opinion, that our pleading contained a cause of action based upon the publication of an untrue condition report.

It is impossible to determine from that opinion, that the third count of this pleading set up a liability claimed to fall within the principles announced by this Court, per Justice McKenna, in *Chesbrough v. Woodworth,* 244 US 72.

The opinion now on file wilfully and deliberately suppresses reference to that controversy, and to the decision above cited.

We apply for a rehearing, for reconsideration of the matter, and for issuance of summary process to compel the Circuit Court of Appeals for the Ninth Circuit to render a true and adequate opinion which will pass upon that question.

Second ground.

Petitioner applies for summary relief by such memorandum opinion, order, or summary process as this Court may have power to issue under Section 240 of the Judicial Code, to compel the Circuit Court of Appeals for the Ninth Circuit, and the United States District Court, for the Northern District of California, Southern Division, to comply with the following provisions of Federal

Law under which petitioner is entitled to a determination of his case on the merits in said District Court, viz.:

United States Constitution Article III, Sections 1 and 2; Article VI, and Amendment V.
Judicial Code, Section 24 (28 USCA 41).

Petitioner also applies for such summary relief to obtain compliance with the following decisions of this Court under which such jurisdiction is recognized, viz.:

Cohens v. Virginia, 19 US (6 Wheat.) 264 at 403;
Chicago Life Ins. Co. v. Needles, 113 US 574;
California Bank v. Kennedy, 167 US 362;
Wyman v. Wallace, 201 US 230;
Siler v. Louisville & Nashville RR Co., 213 US 175;
Macon Grocery Co. v. Atlantic Coast Line RR Co., 215 US 501;
The Fair v. Kohler Die Co., 228 US 22;
Jones National Bank v. Yates, 240 US 541;
Texas & Pacific Ry. Co. v. Rigsby, 241 US 33;
Chesbrough v. Woodworth, 244 US 72;
Texas & New Orleans RR Co. v. Brotherhood of Ry. & Steamship Clerks, 281 US 548.

Statement in Support of Application.

In denying an application for unrestricted review by certiorari, this Court has failed to act with respect to matters which are not subject of a discretion. Article VI of the Constitution provides:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . ."

Petitioner had an absolute right to file his suit in the United States District Court for the Northern District of California. That right was guaranteed by Section 24 of the Judicial Code. That section is a *law of the United States*. That law was made *in pursuance* of a provision of the Constitution of the United States, viz.: Article III, Sections 1 and 2, which provide:

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. . . .
>
> "The Judicial Power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. . . ."

The meaning of these provisions is settled.

That meaning is established by the decisions above cited.

Petitioner's case comes directly within those precedents. It is a case requiring construction and interpretation of Federal law. It is a case involving violation of a duty alleged in good faith to arise under a Federal law. It is a proceeding to enforce a specific remedy claimed in good faith under a Federal statute.

This Court has deemed it unnecessary to reexamine those precedents. That ruling necessarily presents, as a corollary, a question upon which the Court should act, viz.: Enforcement of existing law to guarantee petitioner the same right to Federal jurisdiction which is recognized and accorded to other litigants under like conditions.

Due process under the Fifth Amendment requires recognition and enforcement of that right.

The supremacy of Federal law under Article VI requires enforcement of that right.

Nature of Judicial Function.

Petitioner has invoked the jurisdiction of this Court to obtain relief. The duty created thereby differs from that imposed on a legislative or other body holding merely a discretionary power. (*Cohens v. Virginia,* 19 US 264 at 403.)

Process Available.

Under Section 240 of the Judicial Code, this Court has broad powers of supervision over lower Federal Courts. It may grant full review. It may grant a limited review. It has power to file a memorandum opinion, or order, in a case where the law is settled and a lower Court has exhibited disobedience of precedent. There is power to grant a writ conditionally—to deal with this situation by an order to show cause, or by putting the matter on the summary docket.

By mandamus or by limited process under Section 240 of the Judicial Code, this Court has power to enforce compliance with its decisions.

Petitioner applies for such process and for issuance of an appropriate order requiring the Circuit Court to set aside its judgment, and commanding the District Court to determine, on the merits, all questions disclosed by the pleading now on file in said Court.

Petitioner has relied, to his prejudice, upon the decisions cited. A miscarriage of justice will result in case of a failure to grant this relief.

In the alternative, petitioner applies for a rehearing and reconsideration of the order denying certiorari and for a hearing in this Court upon any questions which are not deemed to be settled by precedent.

Dated, San Francisco, California,
October 31, 1944.

AARON M. SARGENT,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the foregoing petition for rehearing and for relief under Judicial Code, Section 240, is well founded; and that the same is presented in good faith and not for purposes of delay.

Dated, San Francisco, California,
October 31, 1944.

AARON M. SARGENT,
Attorney for Petitioner.

NOV 3 1944
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 197

MARY E. DOBLE,
Petitioner,

vs.

WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, WALTER A. HAAS, WILLIAM F. HUMPHREY, J. C. MCKINSTRY, ALFRED B. SWINERTON and JOSEPH O. TOBIN,
Respondents.

PETITION FOR REHEARING AND FOR RELIEF UNDER JUDICIAL CODE SECTION 240.

AARON M. SARGENT,
Hobart Building, San Francisco 4, California,
Attorney for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Table of Contents

	Page
Petition for rehearing	1
Relief by summary process	2
Duty to remand to District Court to compel recognition of federal laws providing for original jurisdiction	3
Statement in support of such application	3
Nature of the judicial function	4
Process available for summary relief	4
Certificate of counsel	5

Table of Authorities Cited

Cases

	Pages
California Bank v. Kennedy, 167 US 362	2
Chesbrough v. Woodworth, 244 US 72	2
Chicago Life Ins. Co. v. Needles, 113 US 574	2
Cohens v. Virginia, 19 US (6 Wheat.) 264 at 403	2, 4
Jones National Bank v. Yates, 240 US 541	2
Macon Grocery Co. v. Atlantic Coast Line RR Co., 215 US 501	2
Siler v. Louisville & Nashville RR Co., 213 US 175	2
Texas & New Orleans RR Co. v. Brotherhood of Ry. & Steamship Clerks, 281 US 548	2
Texas & Pacific Ry. Co. v. Rigsby, 241 US 33	2
The Fair v. Kohler Die Co., 228 US 22	2
Wyman v. Wallace, 201 US 230	2

Statutes

United States Constitution:	
Article III, Secs. 1 and 2	2, 3
Article VI	2, 3, 4
Amendment V	2
Judicial Code Sec. 24	2, 3
Judicial Code Sec. 240	2, 4, 5
28 USCA 41	2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 197

MARY E. DOBLE,
Petitioner,

vs.

WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, WALTER A. HAAS, WILLIAM F. HUMPHREY, J. C. MCKINSTRY, ALFRED B. SWINERTON and JOSEPH O. TOBIN,
Respondents.

PETITION FOR REHEARING AND FOR RELIEF UNDER JUDICIAL CODE SECTION 240.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Owen J. Roberts, Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson, and Wiley Rutledge, Associate Justices of the Supreme Court of the United States:

Mary E. Doble, the petitioner above named, hereby applies to this Court for a rehearing and reconsideration

of the order entered October 9, 1944, denying application for writ of certiorari.

In addition, said petitioner applies for such relief by way of memorandum opinion, or order or summary process as this Court may have power to issue under Judicial Code Section 240, to compel compliance by the Circuit Court of Appeals for the Ninth Circuit, and by the Southern Division of the United States District Court for the Northern District of California with the following provisions of federal law, under which petitioner is entitled to a determination of her case on the merits in said District Court, viz.:

United States Constitution Article III, Sections 1 and 2; Article VI, and Amendment V;

Judicial Code, Section 24 (28 USCA 41).

Petitioner also applies for such summary relief to obtain compliance with the following decisions of this Court under which such jurisdiction is recognized, viz.:

Cohens v. Virginia, 19 US (6 Wheat.) 264 at 403;

Chicago Life Ins. Co. v. Needles, 113 US 574;

California Bank v. Kennedy, 167 US 362;

Wyman v. Wallace, 201 US 230;

Siler v. Louisville & Nashville RR Co., 213 US 175;

Macon Grocery Co. v. Atlantic Coast Line RR Co., 215 US 501;

The Fair v. Kohler Die Co., 228 US 22;

Jones National Bank v. Yates, 240 US 541;

Texas & Pacific Ry. Co. v. Rigsby, 241 US 33;

Chesbrough v. Woodworth, 244 US 72;

Texas & New Orleans RR Co. v. Brotherhood of Ry. & Steamship Clerks, 281 US 548.

Statement in Support of Application.

In denying an application for unrestricted review by certiorari, this Court has failed to act with respect to matters which are not the subject of a discretion. Article VI of the Constitution provides:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the land * * *"

Petitioner had an absolute right to file her suit in the United States District Court for the Northern District of California. That right was guaranteed by Section 24 of the Judicial Code. That section is a *law of the United States.* That law was made *in pursuance* of a provision of the Constitution of the United States, viz.: Article III, Sections 1 and 2, which provide:

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish * * *
>
> "The Judicial Power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority * * *"

The meaning of these provisions is settled.

That meaning is established by the decisions above cited.

Petitioner's case comes directly within those precedents. It is a case requiring construction and interpretation of Federal law. It is a case involving violation of a duty alleged in good faith to arise under a Federal law. It is

a proceeding to enforce a specific remedy claimed in good faith under a Federal statute.

This Court has deemed is unnecessary to reexamine those precedents. That ruling necessarily presents, as a corollary, a question upon which the Court should act, viz.: Enforcement of existing law to guarantee petitioner the same right to Federal jurisdiction which is recognized and accorded to other litigants under like conditions.

Due process under the Fifth Amendment requires recognition and enforcement of that right.

The supremacy of Federal law under Article VI requires enforcement of that right.

Nature of the Judicial Function.

Petitioner has invoked the jurisdiction of this Court to obtain relief. The duty created thereby differs from that imposed on a legislative or other body holding merely a discretionary power. (*Cohens v. Virginia*, 19 US 264 at 403.)

Process Available.

Under Section 240 of the Judicial Code, this Court has broad powers of supervision over lower Federal Courts. It may grant full review. It may grant a limited review. It has power to file a memorandum opinion, or order, in a case where the law is settled and a lower Court has exhibited disobedience of precedent. There is power to grant a writ conditionally—to deal with this situation by an order to show cause, or by putting the matter on the summary docket.

By mandamus or by special process under Section 240 of the Judicial Code, this Court has power to enforce compliance with its decisions.

Petitioner applies for such process and for issuance of an appropriate order requiring the Circuit Court to set aside its judgment, and commanding the District Court to determine, on the merits, all questions diclosed by the pleading now on file in said Court.

Petitioner has relied, to her prejudice, upon the decisions cited. A miscarriage of justice will result in case of a failure to grant this relief.

In the alternative, petitioner applies for a rehearing and reconsideration of the order denying certiorari and for a hearing in this Court upon any questions which are not deemed to be settled by precedent.

Dated, San Francisco, California,
October 31, 1944.

AARON M. SARGENT,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the foregoing Petition for Rehearing and for Relief under Judicial Code, Section 240, is well founded; and that the same is presented in good faith and not for purposes of delay.

Dated, San Francisco, California,
October 31, 1944.

AARON M. SARGENT,
Attorney for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. (Original)

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT; CURTIS D. WILBUR, FRANCIS A. GARRECHT, WILLIAM DENMAN, CLIFTON MATHEWS, ALBERT LEE STEPHENS and WILLIAM HEALY, as United States Circuit Judges in and for said Ninth Circuit; HOMER T. BONE, as member of said Circuit Court (subject to qualification); PAUL P. O'BRIEN, as Clerk of such Court,
Respondents.

PETITION FOR WRIT OF MANDAMUS
and
MOTION FOR LEAVE TO FILE.

AARON M. SARGENT,
Hobart Building, San Francisco 4, California,
Attorney for Petitioners.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

In the Supreme Court
OF THE
United States

October Term, 1944

No. (Original)

Ernest H. Denicke and Mary E. Doble,
Petitioners,

vs.

United States Circuit Court of Appeals for the Ninth Circuit; Curtis D. Wilbur, Francis A. Garrecht, William Denman, Clifton Mathews, Albert Lee Stephens and William Healy, as United States Circuit Judges in and for said Ninth Circuit; Homer T. Bone, as member of said Circuit Court (subject to qualification); Paul P. O'Brien, as Clerk of such Court,
Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Owen J. Roberts, Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson, and Wiley Rutledge, Associate Justices of the Supreme Court of the United States:

Ernest H. Denicke and Mary E. Doble, the petitioners above named present the document attached hereto designated "Petition for Writ of Mandamus" and move for an order granting leave to file same as an original proceeding in this Court.

Authorities in Support of Motion.

Petitioners seek to institute this action, as an original proceeding, in order to vacate the void judgment, opinion and other entries in the following matter brought to this Court on application for certiorari:

No. 155 "Denicke v. The Anglo California National Bank of San Francisco, et al".

Petition therein was denied October 9, 1944. Petition for rehearing therein will be filed herewith.

In that petition we show that this Court has, in effect. treated such certiorari application as being one made before decision in the Circuit Court. Since all entries made in the Circuit Court were void for violation of court rules—this statement appears to be literally true.

It has become necessary to prosecute a separate action to clear the record. There is a deadlock in the Circuit Court of Appeals. Action to break it up must be obtained

by process issued from this Court. Either or both of the following remedies are available:

1. Summary orders issued from this Court to the Circuit Court under Section 240 of the Judicial Code—commanding the latter Court to take the action which should have been taken in the first instance. Orders made under that section would constitute a special exercise of this Court's "power of supervision" within the meaning of Rule 38, and within the intent of the Jurisdictional Act of 1925 (43 Stat. 936, Chapt. 229).

2. Independent action by writ of mandamus prosecuted by means of the petition presented herewith.

This latter remedy would cover, as of right, any relief which the Court may not deem available to us under Section 240 of the Judicial Code. This Court has an undoubted power of supervision. There is no question regarding the right of petitioners to invoke its jurisdiction and apply for an exercise of that power. If there be a question, it can only be concerned with the nature of the legal action to be employed in bringing about the desired result.

Mandamus will lie whenever the remedy at law is inadequate. If this Court shall find itself unable to grant relief by the making of orders within the scope of the jurisdiction on certiorari, it follows that leave to file the attached petition must be granted, as of course.

The legal basis for independent action is clear. We cite Judicial Code, Sec. 234 (28 USCA 342) which provides:

> "The Supreme Court shall have power to issue writs of prohibition to district courts, when proceed-

ing as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States. . . ."

General power to issue writs is conferred by Section 262 of the Judicial Code (28 USCA 377):

"The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

In addition, this Court has a constitutional power of supervision:

"The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." (Art. III, Sec. 1.)

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby. . . .

"The Senators and Representatives . . . all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution. . . ." (Art. VI.)

Decisions Sustaining Right to Mandamus.

(1) *Hollon Parker, Petitioner,* 131 US 221 at 226:

"The right of mandamus lies, as held in Ex parte Parker, 120 US 737, where an inferior court refuses to take jurisdiction when by law it ought to do so, *or where, having obtained jurisdiction, it refuses to proceed in its exercise.*"

(2) *Ex parte Simons,* 247 US 231;

(3) *Ex parte Parker,* 120 US 737;

(4) *Ex parte Metropolitan Water Co.,* 220 US 539:

Facts: Petitioner invoked the original jurisdiction of this court to obtain a writ of mandamus to vacate void entries made in a District Court, and to compel that court to convene a panel of three judges to hear and determine a case involving constitutionality of a state law. It was held that the writ should issue. We quote from the opinion of Chief Justice White:

"Congress having declared that the merits . . . should be considered and determined by a tribunal consisting of three judges constituted as provided in the act, it results that a tribunal not so constituted did not possess jurisdiction over the subject-matter. . . .

"It follows . . . that the order entered . . . vacating the restraining order theretofore issued and denying the application for an injunction was void. This being the case, it necessarily follows that mandamus is the proper remedy. . . .

"Not being vested with original jurisdiction to pass upon the question of the validity of the Kansas statute, and the petitioner being entitled as of right to have the controversy . . . passed upon by a tribunal

having such original jurisdiction, it follows that we do not possess a discretion to grant or refuse the writ. . . ." (220 US 545-546.)

Subject-Matter of Petition.

Our application seeks only to vacate void entries, and to compel the convening of a court constituted in a manner which will insure a full discharge of the duty of appellate review to which we are entitled under the Fifth Amendment.

We apply for an order that will compel a court, so convened, to pronounce judgment and render an adequate opinion upon the basic questions which are necessary to the validity of the judgment under attack.

We invoke the original jurisdiction of this court and seek the full measure of relief available under the Constitution and laws of the United States in a proceeding of that character.

Dated, San Francisco, California,
October 31, 1944.

AARON M. SARGENT,
Attorney for Petitioners.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. (Original)

ERNEST H. DENICKE and MARY E. DOBLE,
Petitioners,

vs.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT; CURTIS D. WILBUR, FRANCIS A. GARRECHT, WILLIAM DENMAN, CLIFTON MATHEWS, ALBERT LEE STEPHENS and WILLIAM HEALY, as United States Circuit Judges in and for said Ninth Circuit; HOMER T. BONE, as member of said Circuit Court (subject to qualification); PAUL P. O'BRIEN, as Clerk of such Court,
Respondents.

PETITION FOR WRIT OF MANDAMUS.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Owen J. Roberts, Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson, and Wiley Rutledge, Associate Justices of the Supreme Court of the United States:

Ernest H. Denicke and Mary E. Doble, the petitioners above named hereby apply to this Court for issuance of a Writ of Mandamus directed to respondents, and providing for the relief hereinafter specified. The following statement is presented in support of such application:

I.

Petitioners are appellants in the following matter now pending in the United States Circuit Court of Appeals for the Ninth Circuit, viz.:

> Case No. 10,329 entitled "Ernest H. Denicke and Mary E. Doble, Appellants v. The Anglo California National Bank of San Francisco, et al., Appellees."

Petition for Writ of Certiorari in that case was filed in this Court, being docketed as October Term, 1944, No. 155. This Court has on file certified copies of portions of the record in said cause. That record is judicially noticed in the within proceeding. The matters set forth therein are incorporated by reference in support of this petition.

II.

Respondents Curtis D. Wilbur, Francis A. Garrecht, William Denman, Clifton Mathews, Albert Lee Stephens and William Healy are now, and have been at all times herein mentioned, United States Circuit Judges in and for

the Ninth Circuit; respondent Homer T. Bone was appointed by the President and confirmed by the Senate as a Circuit Judge for said circuit; petitioners are advised that such respondent has not yet taken the oath required for qualification, but that he may assume the duties of judge in said circuit before issuance of a writ hereunder. Respondent Paul P. O'Brien, is Clerk of said Circuit Court, and as such has possession of the files and records herein described.

III.

On March 1, 1944, while said Circuit Court of Appeals was in adjournment, respondents William Healy and Paul P. O'Brien caused the following proceedings to be entered in the records of said court in case No. 10,329, viz.:

Item No. 1. An opinion was filed while the Court was adjourned. The following is a true copy of the signature clause thereon:

> "We need not stop to inquire whether the order denying appellants' motion to vacate the judgment was appealable, for the opinion already sufficiently indicates our view that appellants had ample time and a reasonable opportunity to present a full showing in opposition to the compromise. We find no merit in other points argued.
>
> "Affirmed.
>
> _____
>
> _____
>
> William Healy,
>
> United States Circuit Judges."

Item No. 2. Respondent O'Brien made the following entry in the minutes:

"ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE

By direction of the Court, ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this Court in accordance with the opinion rendered."

No such order was ever announced at any session of the Court.

Item No. 3. Respondent O'Brien filed an unsigned printed form without signature, which purports to be a decree in said cause. The following is a true copy thereof:

"United States Circuit Court of Appeals
for the Ninth Circuit

No. 10329

Ernest H. Denicke and Mary E. Doble,
Appellants,

vs.

Anglo California Nat'l Bank, et al.,
Appellees.

DECREE

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted:

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court that the judgment of the said District Court in this case be, and hereby is, affirmed with costs in favor of the appellees and against the appellants.

It is Further Ordered, Adjudged, and Decreed by this Court, that the appellees recover against the appellants for their costs herein expended, and have execution therefor."

Item No. 4. Respondent O'Brien caused said document, purporting to be a "Decree", to be entered in the minute book of said Circuit Court.

IV.

On November 30, 1936 said Circuit Court duly and regularly adopted an amendment to Rule III of the Rules of Practice of such Court. Such amendment was evidenced by an original document filed by respondent O'Brien as a part of its records. The following is a true copy thereof:

"United States Circuit Court of Appeals
for the Ninth Circuit

In the Matter of the Amendment
of Rule III of the Rules of
Practice of this Court.

It is Hereby Ordered that Rule III of the Rules of Practice of this Court be amended by the addition of a paragraph numbered (4) to said rule, as follows:

(4) No adjournment in any of the terms of the Court shall be made to the succeeding term save when made on the last day prior to the beginning of such succeeding term. Appeals shall be deemed de-

cided when announced from the bench in a session of the court at the place of the term in which they are submitted, or when the signed opinions or other documents evidencing their decision are filed with the Clerk.

Dated: Nov. 30, 1936.

(Signed)	Curtis D. Wilbur
	Francis A. Garrecht
(Endorsed)	William Denman
Filed Nov. 30, 1936	Clifton Mathews
Paul P. O'Brien, Clerk	Bert Emory Haney
	United States Circuit Judges."

The Judges who signed that amendment constituted the entire Court on November 30, 1936. Such amendment has been in force ever since that date. The documents and entries described in paragraph III hereof were void and in violation of its terms. The said Circuit Court adjourned on February 28, 1944 until Monday, March 6, 1944. There were no sessions of said Court in the interim.

V.

Petitioners filed a motion in said Circuit Court to vacate said proceedings. Respondents William Healy and Clifton Mathews sat to act on that motion. The latter made the following statement from the bench when petitioners sought to argue the matter:

> "Rule 3, paragraph 5, is a rule made by this court for the guidance and protection of its clerk. Neither you nor your clients have any interest in enforcing that rule. It isn't any of your business whether that is complied with, or not."

Such motion was denied from the bench. There is no action which petitioners are able to take in said Circuit Court to obtain relief from the proceedings described.

VI.

Petitioners have sought relief in this Court under Section 240 of the Judicial Code. Certiorari was denied on October 9, 1944. Petition for a rehearing in that matter will be filed herewith. This application is intended to supplement such petition in case No. 155, to secure such relief as this Court cannot or may not grant thereon.

VII.

The appeal taken to said Circuit Court in said case No. 10,329 involves the following questions that affect the validity of the judgment under attack:

1. Whether the District Court granted petitioners a constitutional trial on their objections (R. 333, 340, and 403) under the terms of any of the following minute entries made by said Court:

March 31, 1942 (R. 392)
April 13, 1942 (R. 398-399)
May 1, 1942 (R. 399)
May 13, 1942 (R. 402)
June 13, 1942 (R. 429)
June 22, 1942 (R. 438)

2. Whether petitioners were entitled to set aside the judgment of the District Court on the ground of mistake, because of reliance upon the terms of said minute entries.

3. Whether the District Court acted arbitrarily, or in excess of its discretion, or failed to exercise any discre-

tion in denying the motion to vacate and other applications for relief described in the order (R. 737-739) made by said Court on August 17, 1942.

VIII.

Petitioners have taken all legal steps available to them to obtain a determination of those questions by said Circuit Court. Those respondents joined herein who are now Judges of said Court have declined to act or pronounce any judgment on appeal with respect to same. It is impossible to obtain a determination thereof in the said Circuit Court without the use of process in the form of a Writ of Mandamus hereunder, or by virtue of appropriate procedure on certiorari, issued by authority of this Court.

IX.

A condition exists in said Circuit Court whereby petitioners are entitled as of right to have Case No. 10,329 heard and decided by the entire Court sitting in bank. Respondents William Healy and Clifton Mathews are involved in violations of Rule III of said Court of such character as to render their participation a denial of due process. Without participation of all other members of said Court on said appeal, it is impossible for petitioners to obtain an adequate consideration thereof in said Court.

Wherefore, petitioners apply to this Court for issuance of a Writ of Mandamus directed to respondents and commanding performance of the following duties enjoined by law, viz.:

1. Cancellation of the documents and entries described in paragraph III hereof.

2. Calling together and convening of a special panel of the United States Circuit Court of Appeals for the Ninth Circuit, to consist of all members of that Court not under legal disqualification, to sit and decide each of the questions described in paragraph VII hereof.

3. Rendition of an opinion in writing supported by the signatures of at least a majority of the judges acting in said matter, filed in compliance with rule III of said Court; such opinion to evidence the action taken by said Court with respect to each ground relied upon to sustain the judgment to be entered by said Court.

4. Entry of a lawful judgment in accordance with an opinion so prepared and filed.

Petitioners apply for allowance of their costs incurred in this matter, and for such other, further or different relief as may be available to them on the facts presented.

Dated, San Francisco, California,
October 31, 1944.

AARON M. SARGENT,
Attorney for Petitioners.

United States of America
State of California } ss.
City and County of San Francisco

ERNEST H. DENICKE, being first duly sworn, deposes and says:

That he is one of the petitioners above named; that he has verified the foregoing application on his own behalf and on behalf of Mary E. Doble, who has joined therein; that affiant has read said "Petition for Writ of Mandamus", knows the contents thereof; that all matters therein stated are true to his own knowledge.

ERNEST H. DENICKE.

Subscribed and sworn to before me this 31st day of October, 1944.

(Seal) CATHERINE E. KEITH,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires December 15, 1946.